

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANT'S BRIEF AND APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

—
No. 7826
—

751

January Term, 1941
—

HENRY J. WATKINS, JR., *Appellant*

vs.

THOMAS M. RIVES, Superintendent of Asylum and Jail,
Appellee

—
An Appeal from the District Court of the United States
for the District of Columbia
—

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An Appeal from the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLANT.

Preliminary Statement.

This is an appeal from an Order of the District Court of the United States for the District of Columbia, discharging writ of habeas corpus, H. C. #2101, dismissing appellant's petition and remanding appellant to the custody of appellee and allowing appellant to be enlarged upon an appearance bond. Appellant is now at liberty having furnished the required bond.

The order of the lower court was made October 29th, 1940. Notice of appeal was filed November 12, 1940. The transcript of record was filed in this Court February 7, 1941. Jurisdiction is conferred on this Court by Title 18, Section 26 1929 D. C. Code.

Statement of the Case.

This case arises out of the case of *In re: Ernst G. Fischer*, deceased, Administration No. 48909 in the Probate Court of the District Court of the United States for the District of Columbia. Ernst G. Fischer died testate in the District of Columbia on September 22, 1935. On October 1, 1935 appellant filed in the Probate Court petition (Ex. 10-11) for the probate of a certain will dated August 12, 1935 (Ex. 1) setting forth that at the time of the death of Ernst G. Fischer, the decedent was possessed of certain household furniture, notes, stocks, bonds, securities, and cash on deposit in banks, all of the estimated value of approximately \$20,500. A caveat was filed, issues framed, and upon trial the jury found that this will was not valid. During this litigation Jerome F. Barnard and Meyer Sawyer, were appointed as collectors of the estate (Ex. 28). Fischer made another will dated May 25, 1935, and this will was admitted to probate September 1, 1938. George E. Bouis, the executor named therein was appointed on September 1st, 1938 (Ex. 206), and is now acting as executor of the Fischer estate by authority of the Probate Court. The final account of the collectors is still awaiting approval and their bond is still outstanding. Subsequent to this trial a rule to show cause was issued against appellant (Ex. 144-147) for the purpose of obtaining from him assets of the estate of Fischer. The appellant in answer to the rule to show cause (Ex. 172-176) denied possession of assets

of the estate of Fischer and claimed title thereto by gift *inter vivos*. The appellant, in further answer to the rule to show cause, also denied that any moneys had been expended by him as executor and claimed that disbursements made by him on account of the bills of Fischer were made as a condition to the gift and not as an executor. On July 16, 1937, issues were framed on the rule and answer and on October 8, 1937, a verdict was directed by the Court (Ex. 194-197) (Appendix A) against the appellant and to the effect:

1. That there was no gift; 2. That the decedent was of unsound mind; 3. That Fischer owned certain property at the time of his death; 4. That all of said property had been disposed of by the appellant prior to the death of the decedent, Fischer. On October 29, 1937 (Ex. 198-199) (Appendix B) an order was made by the Court providing in substance that the assets of the estate of Fischer were in the possession of the appellant and directing him to turn over said assets to the collectors of the estate of Fischer and providing further that upon the failure of the appellant to so turn over said assets within five (5) days, that the value of the assets be fixed and determined and that a judgment be entered against the appellant with execution as at law. On December 7, 1937, an order was made for the determination of the value of the assets (Ex. 201) and for the entry of judgment against appellant. On December 22, 1937, there was a verdict of the jury (Ex. 203) giving the value of the assets set forth in the decree of October 29, 1937, as \$36,108.37, and on January 27, 1938 a decree of judgment was entered against the appellant with execution as at law (Ex. 204). On June 28, 1939, there was a petition for a rule to show cause filed by George E. Bouis, as executor of the estate of Fischer, for the purpose of contempt proceed-

ings against the appellant (Ex. 225-226). On September 19, 1939, return of the rule was made marked served by service on wife of the appellant. On January 5, 1940, a decree for civil contempt (Ex. 271-272) (Appendix C) was entered holding appellant to be in contempt of court for his failure to comply with the turn-over order of October 29, 1937. On September 12, 1940, appellant was committed to the Washington Asylum and Jail pursuant to the order of January 5, 1940. Whereupon these proceedings were instituted for purpose of obtaining the release of appellant from confinement. All orders and proceedings prior to the habeas corpus action were in the Probate Court.

Statutes and Rules Involved.

1929 D. C. Code

Title 29

Section 154

Title 18

Section 102 and Section 136

Title 24 Section 378

Federal Rules of Civil Procedure

Rule 81

Rules of Civil Procedure Of the District Court Of The United States For The District of Columbia

Rule 1

Sections 1 and 2

Probate Rules 1936

Rule 10

Law Rules 1936

Rule 20

Equity Rules 1936

Rule 23

Questions Involved.

Appellant's contention is briefly : That his arrest and commitment to the Washington Asylum and Jail on September 12, 1940 until he complied with the order of October 29, 1937 is illegal.

Seven questions are therefore presented.

1. Did the Probate Court have jurisdiction to determine the title to the property claimed by appellant as a gift *inter vivos*?

2. Was the service of process in the contempt proceeding legally sufficient so that the court had jurisdiction of the person of the appellant for the purpose of commitment.

3. Was the Court bound by the verdict of the jury finding that appellant had disposed of the property in question prior to the death of Ernst G. Fischer and therefore prior to the order to turn over said property to the collectors?

4. May appellant be imprisoned for failure to comply with the alternative provisions of the order of October 29, 1937?

5. Is the verdict of the jury or the decree entered thereon controlling in the event of a variance?

6. May the appellant be legally committed for contempt of Court for non compliance with an order to turn over assets to a collector where an executor has been duly appointed subsequent to the order to turn over the assets to the collector and prior to the order of commitment?

7. May the order of the Court be enforced by both commitment of the person and execution against the property?

Summary of Argument.

The appellant is not in contempt of Court, therefore his arrest and imprisonment is not valid. The trial of the cases involving this appellant have resulted in a money judgment against the appellant and imprisonment for nonpayment thereof is not authorized by law. It has been determined by a jury that the appellant has disposed of all of the property that came into his possession prior to the death of the decedent, Ernst G. Fischer. It is therefore impossible to comply with the order of the Court to turn over these assets to the collectors. Subsequent to the order of October 29, 1937 directing appellant to turn over assets to collectors, an executor of the estate was appointed. *i. e.* September 1, 1938. The power of the collectors therefore ceased and appellant is not in contempt for failing to turn the assets over to him. The Probate Court was without jurisdiction for the reasons that the question of the title to property was involved and the appellant was not legally served with process. The Probate Court may enforce its orders and decrees to the extent authorized by law only. There is no provision in the law for enforcement of its orders and decrees by imprisonment and the execution as at law against the property of the appellant.

ARGUMENT.

I.

The Probate Court was without jurisdiction in this case for two reasons.

A. The question involved is one of title to property. Upon demand being made to turn over certain assets this

appellant refused to turn over any assets for the reason that the assets belonged to him. The appellant was named executor in a will of Ernst G. Fischer, deceased, and filed a petition for the probate of that will and for letters testamentary. The caveat to this will was filed and a judgment was rendered in favor of the caveators, the effect of which invalidated the will. During the course of this litigation collectors were appointed. Upon the termination of the trial of will contest the executors made demand upon the appellant to turn over assets alleged to be in his possession. This demand was made in the form of a petition for a rule to show cause. The appellant answering the rule to show cause refused to turn over said assets on the ground that the property in question belonged to him, title thereto having been obtained by gift from the decedent during his lifetime. Another trial was held involving the issues raised by the rule and answer in the Probate Court. This particular trial terminated in a directed verdict against this appellant. Thereupon the appellant was ordered to turn over the assets to the collectors previously appointed. It is a settled law of this jurisdiction that our Probate Court cannot determine questions involving title to property. *Richardson v. Daggett*, 24 App. D. C. 440, *Jones v. Dunlap* App. D. C. No. 7579 Decided November 4, 1940, and *Holzbierlein v. Grant et al.* App. D. C. No. 7629 Decided January 6, 1941. It may be argued by appellee that this appellant is not a stranger to the estate and that he has acted as executor or is an executor or administrator *de son tort*. However, the fact remains that upon the termination of the contest to the will in this particular case this appellant became an absolute stranger to the estate and upon demand for certain property alleged to be in his possession, he set up title to this property in himself. This it is earnestly contended

deprives the Probate Court of jurisdiction further in the cause and that the trial of the issues involved should be had in a law court. This is not a superficial or trifling argument. It is substantial for the reason * * * This case, if tried in a law court may have resulted in a judgment for the plaintiffs as against the appellant to the full extent of their claim. However, the law court would not have attempted to enforce that judgment by incarceration of appellant in a prison or jail. Judgment would have been rendered against the appellant upon which the only remedy that would have been available would be execution or attachment of law.

B. The Probate Court was without jurisdiction for the reason that there was no service of process as required by law.

Proceedings in contempt require process. This petition and rule were issued by the Probate Court. A petition and rule to show cause are in the nature of process and require personal service. By the terms of Rule 81 of the Federal Rules of Civil Procedure, those rules are not applicable to proceedings in Probate. Rule 81. "These rules do not apply * * * to Probate adoption and lunacy proceedings of the District Court for the District of Columbia except to appeals therein." The simplified rules do not apply to the service of process in the Probate Court. Rule 1, sections 1 and 2 being as follows:

1. "These Rules shall take effect on the 16th day of September, 1938. They shall apply to all civil actions and proceedings except such as are excluded by Rule 81 of the Federal Rules of Civil Procedure, unless herein made applicable to the actions and proceedings thus excluded."

2. "In the determination of contested issues of law or fact, or of law and fact, in probate, adoption and lunacy proceedings, these Rules and the Federal Rules of Civil Procedure, as now or hereafter in force, shall also govern the procedure on motions, depositions, discovery and testimony, and at the hearing or trial of such issues." Therefore the service of the petition and rule should have been made on the appellant personally or perhaps by publication as provided in title 24 Section 378 1929 D. C. code. The return of the Marshal of the rule to show cause on September 19, 1939 shows on its face that service thereof was had on the wife of the appellant. The Court did not obtain jurisdiction of the person of the appellant by means of the process thus served.

II.

The property that the Court ordered the appellant to turn over to the Collectors had been disposed of by the appellant prior to the order.

In the trial that was held for the purpose of determining the title to this property issues were framed and two of these issues were in substance: What property did the decedent, Ernst G. Fischer, possess and, second, what property of the decedent did the appellant dispose of during the lifetime of the decedent. It will appear from the verdict of the jury, (Appendix "A") (Ex. Nos. 194-197), that in answering these issues the jury decided that all of the property that had belonged to Ernst G. Fischer during his lifetime had been disposed of by the appellant prior to the death of Ernst G. Fischer. It, therefore, appears that the property that the Court ordered the appellant to turn over to the collectors had been disposed of prior to the

time that the order was made. Therefore, it was impossible for the appellant to have complied with the order of the Court to turn over assets for the reason that, as stated, the appellant had disposed of these assets. It is felt, therefore, that in view of the finding of the jury that all of the assets of Ernst G. Fischer, that had come into the possession of appellant, had been disposed of during the lifetime of Ernst G. Fischer, that the order directing appellant, to turn over those assets to the collectors is invalid and the appellant not being capable of complying with the order is not in contempt of Court. *Moyer v. Cummings* 17 App. D. C. 269.

3. The order of October 29, 1937, is not enforceable by imprisonment for contempt. An examination of the order of October 29, 1937, will show that the order is drawn in the alternative. In substance it provides as to this particular point, that the appellant shall turn over certain assets of the estate to the collectors. And, then the order provides that upon his failure to do so within five days from the signing thereof, the full value of all of said assets, or such part thereof as may be eloiigned by the appellant, shall be fixed and determined and thereupon judgment entered against the appellant, with execution as at law. There were two jury trials in connection with this particular phase of the case. As shown by Exhibit Nos. 194-197, (Appendix "A") it was found that certain assets of the decedent had been disposed of by appellant, during decedents lifetime, while the second jury verdict, the value of the eloiigned assets were determined and judgment was entered against the appellant with execution as at law. This judgment fixing the value of the assets (Exhibit No. 203), shows that in fixing this value, the value as fixed is equal to all the

assets involved. Therefore, by force of these two jury verdicts it is apparent that all of the assets of Ernst G. Fischer, deceased, had been disposed of by appellant, prior to the making of this order of October 29, 1937. The order, therefore, being drawn in the alternative, and the alternative provision providing for the rendering of a judgment against appellant, as to the value of eligned assets and the verdict of the jury finding that all the assets of Ernst G. Fischer, deceased, having been eligned by the appellant is certainly not enforceable by imprisonment for contempt.

4. The verdict of the jury is controlling. May we again refer to Exhibits (194-197) (203) (198-199), (Appendix "A"- "B") being the verdicts of the juries and the order of the Court of October 29, 1937. The jury finds as shown by the minute entry of October 8, 1937. (Exhibits No. 194-197), (Appendix "A") in answer to issues 4a and 4b that all of the property of Ernst G. Fischer had been disposed of by appellant during the lifetime of the decedent.

Now let us look at the provisions of the order of October 29, 1937, relative thereto. In the order there is a recitation to the effect that the appellant has possession of the very property that the jury found had been eligned or disposed of by the appellant during the lifetime of the decedent. Certainly if the jury has found that the property in question has been disposed of during the lifetime of the decedent, then, can the Court find in a decree based on that very verdict of the jury, that the appellant has possession of those assets and then imprison him for contempt for failure to turn over those assets to the collectors. It is the contention of the appellant that the verdict of the jury is controlling, that there is a variance between the

verdict of the jury and the order of the Court. Therefore the order of the Court finding that the appellant has possession of these specific assets is not controlling and that in accordance with the verdict of the jury the appellant had disposed of all of the assets in question during the lifetime of Ernst G. Fischer.

5. The appointment of an executor terminates the power of the collectors. The appellant in this case has been adjudged in contempt of court and has been imprisoned therefor, for failing to turn over assets to collectors referred to in the order of October 29, 1937, (Exhibits No. 198-199). (Appendix "B".) The record in the case (Exhibit No. 206) will show that on September 1, 1938, George Ezekial Bouis was appointed executor of the estate of Ernst G. Fischer, deceased. Title 29 Section 154 1929 D. C. code provides as follows: "On the granting of letters testamentary or of administration the power of any such collector shall cease" * * *. This order of October 29, 1937 was made before the appointment of an executor. However, the order of commitment by means of which the appellant was incarcerated in the Washington Asylum and Jail, was made after the appointment of the executor. The collectors had no authority in law or in fact to receive the assets of the estate. *Burgess v. Boswell*, 139 Md. 679—*Baldwin v. Mitchell*, 86 Md. 380.

It is respectfully submitted, therefore that upon the appointment of George Ezekial Bouis as executor of the estate of Ernst G. Fischer, deceased, the power of the collectors ceased and, therefore, compliance with the order as now existing was impossible. An equity decree may be enforced by imprisonment in cases especially provided for. In this case the order of October 29, 1937, directs the appellant to

turn over certain assets to the collectors of the estate of Ernst G. Fischer, and the decree provides further that upon failure to turn over these assets that their value shall be ascertained and a judgment entered against the appellant. The appellant did fail to turn over these assets and a judgment has been rendered. Therefore, in view of the fact that a judgment has been rendered against appellant there is no provision in the law for imprisonment of the appellant for failure to pay the judgment. The effect of this order, if read in its entirety and if considered as a whole, is to imprison this appellant for failing to pay the judgment which was entered against him as directed by the order of 1937. There is no authority in law for this imprisonment. *Rapeer v. Colpoys*, 66 App. D. C. 216-85 Fed. 2nd 715.

6. The decrees of the Probate Court may be enforced only in accordance with the law. The Code of Laws for the District of Columbia, Title 18 Sec. 136 provide that the decrees of the Probate Court may be enforced in the same manner as a decree in equity. The District of Columbia Code, Title 18, Section 102, provides that a decree of an equity court may be enforced by imprisonment and if enforcement of that decree is sought by way of imprisonment, there is no alternative means of enforcement provided in the law. The law provides, Title 18 Sec. 102, 1929 D. C. code, * * * "And in case any defendant shall be arrested and brought into court upon any process of contempt, issued to compel the performance of any decree, the Court may upon motion order such defendant to stand committed, or may order his estate and effects to be sequestrated and payment made as above directed, or possession of his estate and effects to be delivered by order and injunction as above directed, until such decree or order

shall be fully performed and executed according to the tenor and true meaning thereof and the contempt cleared. But where the decree only directs the payment of money, no defendant shall be imprisoned except in those cases especially provided for."

It is, therefore, apparent, that in cases especially provided for under the law, enforcement of a decree in equity may be had by means of imprisonment. However, even in cases where imprisonment is authorized there is no alternative means provided in the law for the enforcement of the decree. Imprisonment is apparently and obviously exclusive and if proceedings by way of imprisonment are had, then and in that event, there is no other means provided whereby the equity court may enforce its decrees. *Moss v. U. S.*, 23 App. D. C. 475.

Conclusion.

This case presents a question of a serious nature involving the imprisonment of the appellant for an indeterminate period of time. It is sincerely urged, therefore, that the liberty of the appellant should not be taken from him except strictly in accordance with law. It is respectfully submitted for the reasons herein stated that the appellant has been imprisoned illegally and in violation of his constitutional rights. The judgment below, therefore, should be reversed.

Respectfully submitted,

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APPENDIX.

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APPENDIX "A".

Minute Entry of October 8, 1937 (Exhibit 194-197).

Unless it shall have been found in response to Issues Nos. 1 to 3 that all of the money and assets of Ernst G. Fischer were given to Henry J. Watkins, Jr., while Ernst G. Fischer was of unsound mind and free from undue influence, then

(a) What moneys and assets did Ernst G. Fischer own at the time of his death: (Answered by direction of the Court: See Memo. 4-a hereto attached.)

ISSUE 4-a

40 shares General Electric stock
Net proceeds of sale of
232 shares Amer. Tob. "B" stock—\$11,806.23
20 shares American-Hawaiian S.S. stock
\$15,000 Manchester Terminal Bonds, 7%—2nd Lien
\$30,000 Associated Gas & Elec. Bonds, 4%—1978
10 shares Radio Corp. of America, Common stock
\$ 10.00 cash by check
\$382.14 " " "
\$290.00 " " "
\$ 25.00 " " "

Issue 4-b is as follows—

(b) What moneys and assets owned by Ernst G. Fischer or the proceeds thereof, had been disposed of by Henry J. Watkins, Jr., prior to the death of Ernst G. Fischer otherwise than by application to the use of said Ernst G. Fischer? (Answered by direction of the Court. See Memo. 4-b, hereto attached). The answer of the jury is as follows—

ISSUE 4-b

1. Net proceeds of 232 shares Amer. Tob. "B" stock—
\$11,806.23
2. 15 \$1000. Manchester Terminal Bonds, 7% 2nd Lien
3. 30 \$1000. Associated Gas & Elec. Bonds, 4%, 1978
4. 40 shares General Electric stock
5. Cash received by checks as follows:
\$ 10.00
\$382.14
\$290.00
\$ 25.00

APPENDIX "B".

"Decree ordering transfer and delivery of estate assets to collectors. October 29, 1937.

Upon consideration of the petition of Jerome F. Barnard, Co-Collector herein, for rule to show cause against Henry J. Watkins, Jr., the rule issued herein thereon, the second amended answer thereto of the said Henry J. Watkins, Jr., and upon further consideration of the order entered herein under date of July 16, 1937 framing issues for trial by Jury, and it appearing to the Court that trial of the said issues has been had and upon consideration of the verdict of the said Jury upon said issues rendered on October 8, 1937, in proceedings in Circuit Division No. 2 of the District Court of the United States for the District of Columbia, holding a Special Term as a Probate Court for the trial of said issues, which verdict has been duly certified to this Court: and it appearing to the Court from the said petition, answer,

order and verdict and the other records of this administration cause that Henry J. Watkins, Jr., was named as executor in a paper writing dated August 12, 1935, that the said Henry J. Watkins, Jr. exercised the powers and performed the duties of an executor, instituted these proceedings by his petition seeking confirmation of his acceptance of his appointment as executor as aforesaid and that the said Henry J. Watkins, Jr. has in his possession certain of said decedent's personal property being (1) \$11,806.23 the net proceeds of 232 shares Amer. Tob. "B" stock, (2) 15 \$1,000 Manchester Terminal Bonds, 7% 2nd Lien, (3) 30 \$1000 Associated Gas & Elec. Bonds, 4% 1978, (4) 40 shares General Electric stock, (5) Cash received in the sum of \$707.14; it is, by the Court, this 29th day of October, 1937,

ADJUDGED, ORDERED and DECREED that the said Henry J. Watkins, Jr. be, and he hereby is, directed to transfer and deliver forthwith to the Collectors of the estate of said decedent, all of the aforesaid assets of the said estate, and upon his failure so to do within five days from the signing hereof, the full value of all of said assets or such part thereof as may be eligned by the said Henry J. Watkins, Jr., shall be fixed and determined and thereupon judgment entered against the said Henry J. Watkins, Jr., with execution as at law.

/s/ JOSEPH W. COX, *Justice*".

APPENDIX "C".

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

Holding a Probate Court.

*In re: Estate
of**ERNST G. FISCHER, Deceased.*

Administration No. 48,909.

Decree for Civil Contempt.

This cause having come on for hearing upon a Rule to Show Cause issued out of this Court against Henry J. Watkins, Jr., upon the petition of George Ezekiel Bouis, executor of the estate of the above named decedent, and upon consideration thereof, and it appearing to the Court that service of a copy of said petition and rule has been duly made upon said Henry J. Watkins, Jr., and that no answer to said petition or to said rule has been filed either in person or by counsel upon the return thereof, and it further appearing to the Court upon hearing on said rule in open Court that the said Henry J. Watkins, Jr., has not complied with the order of this Court dated October 29, 1937, requiring him to pay and turn over certain assets which were, by verdict of jury on December 23, 1937, valued at \$36,108.37 said value being incorporated in a decree of judgment entered by this Court January 27, 1938, and the said Henry J. Watkins, Jr., having failed to show any cause why he should not be adjudged in contempt of this Court for his failure to comply with said order, it is by the Court this 5th day of January, 1940,

ADJUDGED, ORDERED and DECREED that the said Henry J. Watkins, Jr., has been and continues to be guilty of contempt of this Court and in punishment therefor said Henry J. Watkins, Jr., be and he is hereby committed to the Washington Asylum and Jail, and the United States Marshal be and he is hereby directed to deliver to, and the Washington Asylum and Jail is hereby commanded to receive into its custody the body of the said Henry J. Watkins, Jr., and safely keep in its custody said body until the said Henry J. Watkins, Jr., shall comply with the said order of this Court dated October 29, 1937, directing him to transfer and deliver up to the said estate (1) \$11,806.23 the net proceeds of 232 shares Amer. Tob. "B" stock, (2) 15 \$1000. Manchester Terminal Bonds. 7% 2nd Lien (3) 30 \$1,000 Associated Gas & Elec. Bonds, 4% 1978, (4) 40 shares General Electric stock, (5) Cash received in the sum of \$707.14; or otherwise purge himself by showing that he has disposed of the said assets and by delivery to the said estate of acceptable assets equivalent to the value fixed by the jury verdict aforesaid; and that this shall be authority for the Washington Asylum and Jail to receive and safely keep the said body until further order of this Court.

/s/ F. DICKINSON LETTS,
Justice.

APPENDIX "D".

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

In Re:

HENRY J. WATKINS, JR.,
Petitioner.

Habeas Corpus No. 2101.

Order Discharging Writ of Habeas Corpus.

This cause came on for hearing upon the petition, the amendment thereto, the writ of habeas corpus, the return and answer to the petition and amended petition, and, upon consideration thereof and the evidence adduced in open Court, it is by the Court this 29th day of October, 1940

ORDERED that the writ of habeas corpus heretofore issued herein by, and the same is, hereby discharged and the petition, as amended, dismissed, and the petitioner remanded to the custody of respondent; provided, however, that pending an appeal herefrom, it is further

ORDERED that petitioner be enlarged upon an appearance bond in the penal sum of seven thousand five hundred dollars, (\$7,500.00), subject to further orders from the Court and conditioned to enure to the benefit of the estate of Ernst G. Fischer, deceased, in the event of the breach of any of the conditions of said bond by the petitioner.

s/ JESSE C. ADKINS,
Justice.

Approved as to form.

.....
Attorney for Petitioner.

APPENDIX "E".

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.**

In Re:

HENRY J. WATKINS, JR.,
Petitioner.

Habeas Corpus No. 2101.

Findings of Fact and Conclusions of Law.

Findings of Fact.

1. This is a petition for writ of habeas corpus to secure the discharge of Watkins from an order committing him to custody until he shall comply with the provisions of an order of October 29, 1937 directing him to deliver to Jerome F. Barnard, co-collector, certain described property found to belong to the estate of Ernst G. Fischer.

2. Ernst G. Fischer died in the District of Columbia on September 22, 1935.

3. On October 1, 1935 petitioner filed in the Probate Court a petition for the probate of a certain will dated August 12, 1935 in which he stated that decedent at the time of his death "was possessed of certain household furniture, notes, stocks, bonds, securities and cash on deposit in banks, all of the estimated value of approximately \$20,500".

Said petition does not further describe said assets, but I find as a fact that some or all of the property mentioned in the decree of October 29, 1937 above mentioned was included by petitioner in the property intended to be described in his petition.

4. As result of a caveat issues were framed and upon trial the jury found that Fischer lacked mental capacity to execute said alleged will and that said execution was obtained by undue influence. During the litigation Jerome F. Barnard and another were appointed collectors of the estate.

5. The will dated May 25, 1935 was admitted to probate September 1, 1938. George E. Bouis, the executor named therein, has qualified and is now acting as executor of the Fischer estate by authority of this Court. The final account of the collectors is still awaiting approval and their bond is still outstanding.

6. Said order of October 29, 1937 finds "that said Henry J. Watkins, Jr. exercised the powers and performed the duties of an executor".

Sometime after Mr. Fischer's death petitioner Watkins delivered to his then counsel \$1933 with directions to pay the expenses of the funeral of the deceased and the bills of a number of physicians for services rendered to the deceased Fischer.

7. In view of my opinion that this Court is bound by the finding above quoted in the decree of October 29, 1937 I have not examined the record in that case for the purpose of ascertaining all facts upon which that finding was based.

8. On May 20, 1937 Jerome F. Barnard, co-collector of the Fischer estate, filed a petition alleging that property belonging to said Fischer was in the possession of said Watkins and asking that a rule be issued upon him to show cause why he should not deliver the property to the collectors; said petition is made part hereof by reference.

9. On June 24, 1937 said Watkins filed an answer under oath in which he took the position that the property involved had been given to him by decedent Fischer during the latter's lifetime, upon condition that Watkins pay all just debts of decedent.

Watkins filed an amended answer on July 6, 1937 and a further amended answer on July 16, 1937. All three answers are made part hereof by reference.

10. During his testimony given on February 25, 1937 during the trial mentioned in Finding 4 Watkins for the first time took the position that the property involved belonged to him as result of a gift.

11. On July 16, 1937, an order was signed framing certain issues upon said petition and answers set forth in Findings 8 and 9, which issues were to be tried by a jury.

On October 8, 1937 the jury made written answers to said issues, copy of the second minute entry containing the directed verdict is made part hereof by reference.

In the first issue the jury found that the property involved had not been given by said Fischer to said Watkins; and as to the second issue the jury found that at the

time of the alleged gift said Fischer was not of sound and disposing mind. Issue 4-a is as follows:

Unless it shall have been found in response to Issues Nos. 1 to 3 that all of the money and assets of Ernst G. Fischer were given to Henry J. Watkins, Jr., while Ernst G. Fischer was of unsound mind and free from undue influence, then

(a) What moneys and assets did Ernst G. Fischer own at the time of his death: (Answered by direction of the Court: See Memo. 4-a hereto attached).

ISSUE 4-a

40 shares General Electric stock
 Net proceeds of sale of
 232 shares Amer. Tob. "B" stock—\$11,806.23
 20 shares American-Hawaiian S. S. stock
 \$15,000 Manchester Terminal Bonds, 7%—2nd Lien
 \$30,000 Associated Gas & Elec. Bonds, 4%—1978
 10 shares Radio Corp. of America, Common Stock
 \$10.00 cash by check
 \$382.14 " " "
 \$290.00 " " "
 \$ 25.00 " " "

Issue 4-b is as follows:

(b) What moneys and assets owned by Ernst G. Fischer or the proceeds thereof, had been disposed of by Henry J. Watkins, Jr., prior to the death of Ernst G. Fischer otherwise than by application to the use of said Ernst G. Fischer? (Answered by direction of the Court. See Memo. 4-b, hereto attached.)

The answer of the jury is as follows:

ISSUE 4-b

1. Net proceeds of 232 shares Amer. Tob. "B" stock—\$11,806.23
2. 15 \$1000. Manchester Terminal Bonds, 7% 2nd Lien
3. 30 \$1000. Associated Gas & Elec. Bonds, 4%, 1978

4. 40 shares General Electric stock
5. Cash received by checks as follows;
 \$ 10.00
 \$382.14
 \$290.00
 \$ 25.00

12. On October 29, 1937 the court signed an order decreeing transfer and delivery of the estate assets to the collectors, from which order an appeal was noted in open court on behalf of Watkins. Counsel for the co-collectors and for Watkins attended at the signing of the order, which said order is as follows:

“Decree ordering transfer and delivery of estate assets to collectors.

Upon consideration of the petition of Jerome F. Barnard, Co-Collector herein, for rule to show cause against Henry J. Watkins, Jr., the rule issued herein thereon, the second amended answer thereto of the said Henry J. Watkins, Jr., and upon further consideration of the order entered herein under date of July 16, 1937 framing issues for trial by Jury, and it appearing to the Court that trial of the said issues has been had and upon consideration of the verdict of the said Jury upon said issues rendered on October 8, 1937, in proceedings in Circuit Division No. 2 of the District Court of the United States for the District of Columbia, holding a Special Term as a Probate Court for the trial of said issues, which verdict has been duly certified to this Court; and it appearing to the Court from the said petition, answer, order and verdict and the other records of this administration cause that Henry J. Watkins, Jr., was named as executor in a paper writing dated August 12, 1935, that the said Henry J. Watkins, Jr. exercised the powers and performed the duties of an executor, instituted these proceedings by his petition seeking confirmation of his acceptance of his appointment as executor as aforesaid and that the said Henry J. Watkins, Jr. has in his possession

certain of said decedent's personal property being (1) \$11,806.23 the net proceeds of 232 shares Amer. Tob. "B" stock, (2) 15 \$1000 Manchester Terminal Bonds, 7% 2nd Lien, (3) 30 \$1000 Associated Gas & Elec. Bonds, 4%, 1978, (4) 40 shares General Electric stock, (5) Cash received in the sum of \$707.14; it is, by the Court, this 29th day of October, 1937, ADJUDGED, ORDERED and Decreed that the said Henry J. Watkins, Jr. be, and he hereby is, directed to transfer and deliver forthwith to the Collectors of the estate of said decedent, all of the aforesaid assets of the said estate, and upon his failure so to do within five days from the signing hereof, the full value of all of said assets or such part thereof as may be eligned by the said Henry J. Watkins, Jr. shall be fixed and determined and thereupon judgment entered against the said Henry J. Watkins, Jr. with execution as at law.

/s/ JOSEPH W. COX, *Justice.*"

13. Watkins failed to comply with the order of court.

14. On December 7, 1937 an order was signed directing the jury to ascertain the full value of said assets. Said order is made part hereof by reference.

On December 23, 1927 a jury duly impaneled, found "the value of the assets as set forth in the decree of October 29, 1937 is \$36,108.37".

15. On January 27, 1938 a decree of judgment was entered by this Court against said Watkins in the sum of \$36,108.37. Said decree is made part hereof by reference.

16. On June 28, 1939 said George Ezekiel Bouis, executor of the estate of said Fischer, filed a petition herein reciting the provisions of said order of October 29, 1937

stating that none of said assets had been turned over to the collectors or to the executor, and asking that a rule be issued against said Watkins requiring him to show cause why he should not be adjudged in contempt of court for his failure to comply with the provisions of said order.

On June 28, 1939 an order to show cause was issued; said order and the return of the marshal that copy of said rule was served upon said Henry J. Watkins, Jr. by serving copy upon Mrs. Watkins (an adult on the premises) are made part hereof by reference.

The service was made in this manner by direction of the attorney for the executor.

17. On January 5, 1940 the court signed an order adjudging said Watkins in contempt of court for failure to turn over said assets and adjudging that said Watkins be committed to the Washington Asylum and Jail until he did comply with said order of October 29, 1937, or otherwise purge himself by showing that he has disposed of said assets, and by delivery to said estate of acceptable assets equivalent to the value fixed by the verdict of the jury of said assets.

18. On September 14, 1940 said Watkins filed a petition being No. 2100 *Habeas Corpus* in this Court alleging that he had been taken into custody upon said order and seeking his discharge from such custody.

After answer filed and hearing held before him the Chief Justice of this Court on September 14, 1940 signed an order dismissing said petition and remanding petitioner

to the custody of the respondent. The papers in said case are made part hereof by reference.

November , 1940.

JESSE C. ADKINS,
Justice.

Conclusions of Law.

The Court concludes as matter of law—

1. None of the constitutional rights of the petitioner have been violated.
2. The Probate Branch of this Court had jurisdiction of the subject-matter involved in the administration proceedings on the estate of Ernst G. Fischer, deceased, in Cause No. 48,909.
3. The Probate Branch of this Court had jurisdiction of the person of the petitioner.
4. This Court is bound by the order and decrees of the Probate Court entered in Administration Cause No. 48,909.
5. The notice given Watkins of the rule to show cause was appropriate and personal service was not required.
6. The Probate Court had power at any time to enforce compliance of its order and decree by imprisonment.

7. The entry of judgment for the value of the assets concealed by Watkins was in accordance and consistent with the decree and was not an election to pursue another remedy.

8. Upon his appointment and qualification the executor succeeded to all of the rights, powers and duties of the former collectors.

9. The petitioner is not entitled to relief under the writ of *habeas corpus* herein.

November , 1940.

JESSE C. ADKINS,
Justice.

No. 7826

**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1941—SPECIAL CALENDAR

HENRY J. WATKINS, JR., APPELLANT

v.

THOMAS M. RIVES, SUPERINTENDENT OF WASHINGTON ASYLUM
AND JAIL, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF AND APPENDIX ON BEHALF OF APPELLEE

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In the United States Court of Appeals for the District of Columbia

APRIL TERM, 1941—SPECIAL CALENDAR

No. 7826

HENRY J. WATKINS, JR., APPELLANT

v.

THOMAS M. RIVES, SUPERINTENDENT OF WASHINGTON ASYLUM
AND JAIL, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLEE

COUNTER STATEMENT OF THE CASE

This appeal seeks to set aside, in a *habeas corpus* proceeding, a decree for civil contempt entered in the Estate of Ernst G. Fischer, deceased, Administration Case No. 48909 in the Probate Branch of the District Court of the United States for the District of Columbia. That decree for civil contempt was entered January 5, 1940 (R. 473), and an appeal therefrom, though noted, was never perfected. Upon commitment, on September 12, 1940, of the appellant to the Washington Asylum and Jail, in execution of the said decree, this *habeas corpus* proceeding was instituted. After full hearing, and review of the entire proceedings in the administration case leading up to the decree for civil contempt, appellant's petition was dismissed and this appeal followed.

In order that a full picture of the case may be had, it is necessary to recite the following facts relating to the administration proceedings:

(1)

The decedent, Ernst G. Fischer, entered a Washington hospital in May 1935, with cancer of the bladder, in an incurable condition (R. 792), and was kept under the influence of morphine (R. 727) until his death on September 22, 1935 (R. 792). The appellant here, Henry J. Watkins, Jr., visited the decedent at the hospital and, by the early part of July 1935, had learned of the decedent's incurable condition (R. 728). The appellant became a frequent visitor at the hospital (R. 770), took charge of the decedent's affairs (R. 793), and took possession of the decedent's papers and records (R. 671).

On August 12, 1935, appellant obtained from the decedent an alleged will naming the appellant as executor and sole beneficiary (R. 601). On August 14, 1935, appellant obtained from the decedent an unrestricted power of attorney (R. 612) and entered the safe deposit box maintained by the decedent at a local bank and took the entire contents from said box, the contents including most of the securities which are the subject of the contempt order (R. 737, 739). On August 21, 1935, the appellant took possession of \$11,806.23, the net proceeds of the sale by him of 232 shares of stock of the American Tobacco Company belonging to the decedent (R. 622).

Immediately upon the death of the decedent, on September 22, 1935, appellant took charge of the body of the deceased, refused the request of the hospital authorities for an autopsy, selected the undertaker, the pallbearers, the flowers, the casket, and other essentials, and completed the entire arrangements for the funeral and burial of the decedent (R. 681, 683, 684). The day after the decedent's death, appellant closed the safe-deposit box standing in the name of the decedent (R. 696). Appellant then destroyed most of the records belonging to the decedent, of which he, the appellant, had taken possession (R. 671).

Thereafter on October 1, 1935, the appellant filed his petition, under oath, for probate of the alleged will dated August 12, 1935; reported, in general terms, the existence of the decedent's assets, and asked the Court to confirm him in the position of executor (R. 43). At that time appellant still retained possession of the assets (R. 763, 764). Shortly there-

after, he turned over to his then counsel of record \$1,973.00 of cash assets belonging to the decedent, with instructions to pay the undertaker's bill and certain doctors' bills incurred by the decedent during his last illness (R. 288). The appellant paid out of other estate assets certain other bills, including hospital and nurses' bills (R. 744).

A caveat was filed against the alleged will dated August 12, 1935, and the resultant will contest ended on March 2, 1937 by the return of the jury verdict, holding that the decedent, on August 12, 1935, was not of sound and disposing mind, capable of making a valid deed or contract, and was the subject of undue influence of the appellant or others unknown (R. 232, 233).

Collectors of the decedent's estate had been appointed on February 12, 1936, but had failed in their efforts to obtain the estate assets held by appellant. One of the collectors, who was attorney of record for the appellant, declined to do anything further in the matter. The other collector, on May 20, 1937, filed a petition setting forth the facts and asking that a rule be issued against the appellant to show cause why he should not transfer and deliver the Fischer estate assets and fully account to the Probate Court for all funds collected by him and claimed to have been disbursed for the account of the decedent's estate. That petition asserted that the appellant had been acting as the executor, had performed certain duties of the executor, had admitted possession of the assets sought, had concealed the said assets, and had failed to pay all of the debts and expenses of the decedent as claimed by the appellant (R. 268, 269, 270, 271).

Pursuant to said petition, a rule to show cause was issued against the appellant (R. 275), and, under oath, the appellant filed an answer (R. 290), an amended answer (R. 298), and a second amended answer (R. 312), therein admitting most of the material allegations of the co-collector's petition. The appellant admitted the items sought to be recovered were owned by the decedent, but claimed that the items of which he took possession on August 14, 1935, and August 21, 1935, became his as the result of a gift by the decedent. In accordance with the probate procedure, issues were there-

upon framed (R. 318) and tried before a jury, resulting in a further verdict, dated October 8, 1937, in proceedings in the Circuit Division of the Court, to the effect that the decedent was not of sound and disposing mind and capable of making a valid deed or contract on August 14, 1935, or August 21, 1935 (R. 350). Other issues, made immaterial by the aforesaid findings, were also tried, including the issue of whether or not the decedent had made a gift of the assets to the appellant.

Thereafter, on October 29, 1937, a decree (R. 356) was entered, reciting consideration of the collector's petition, the rule to show cause, the answers thereto of the appellant, the framed issues, the jury verdict upon the issues, and the other records of the administration cause, and in said decree the Probate Court found that the appellant had been named as executor, had exercised the powers and performed the duties of an executor, had instituted the probate proceedings, had asked confirmation of his appointment under the will, and that the appellant then had in his possession each of the items of the decedent's personal property which later became the subject of the decree for civil contempt. In that decree of October 29, 1937, the Probate Court ordered the appellant to transfer and deliver to the estate all of the enumerated assets, and further provided that, upon his failure so to do within five days from the signing of the decree, the value of the assets should be fixed and determined and judgment entered with execution as at law. Upon the bottom of the decree, the appellant noted an appeal, and on November 1, 1937, counsel for the appellant filed written exceptions to the signing of the decree. However, the appeal was never prosecuted.

Following that decree and a showing before another jury that appellant had failed to deliver the assets, and evidence of the value of said assets, a verdict and a judgment were entered showing the total value of the assets eloigned by appellant to be \$36,108.37 (R. 368).

Thereafter, on September 1, 1938, letters testamentary were issued (R. 384) to one George E. Bouis, the nominated executor in a will dated May 25, 1935, and duly probated. Thereafter, Bouis, as the newly appointed executor, caused to be

issued a rule against the appellant to show cause why he should not be held in contempt for failure to obey the decree of October 29, 1937. Copy of the petition (R. 403) and rule (R. 407) were served upon appellant by the United States Deputy Marshal leaving a copy with the wife of the appellant at the appellant's last-known place of abode in the District of Columbia (R. 409), the same place as that stated in the appellant's testimony (R. 796).

On January 5, 1940, the Probate Court issued the decree (R. 473) for civil contempt, after consideration of the petition and after determining that the appellant had been duly served and that he had failed to answer or show any cause why he should not be adjudged in contempt. At no time has the appellant ever fully accounted for the decedent's assets nor has he ever attempted to show any inability on his part to comply with the Probate Court's decree.

STATUTES AND RULES INVOLVED

D. C. Code (1929), tit. 18, § 102:

Enforcement of decrees.—* * * and in case any defendant shall be arrested and brought into [the equity] court upon any process of contempt issued to compel the performance of any decree, the court may, upon motion, order such defendant to stand committed, or may order his estate and effects to be sequestrated and payment made, as above directed, or possession of his estate and effects to be delivered by order and injunction as above directed, until such decree or order shall be fully performed and executed, according to the tenor and true meaning thereof, and the contempt cleared; but where the decree only directs the payment of money no defendant shall be imprisoned except in those cases especially provided for. (Mar. 3, 1901, 31 Stat. 1208, c. 854, sec. 113.)

D. C. Code (1929), tit. 18, § 132:

Limitation on jurisdiction.—The said probate court shall not, under pretext of incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given by this code; but every judgment, decree, decision or order, of the said court, may be en-

forced by attachment and sequestration as aforesaid; and if the said judgment, decree, decision or order, be for paying money, the property sequestrated may, at the discretion of the court, be applied to the purpose for which such judgment, decree, decision or order, was given. (Act of Maryland, 1798, c. 101, subc. 15, sec. 20; Mar. 3, 1901, 31 Stat. 1208, 1214, c. 854, secs. 116 and 142.)

D. C. Code (1929), tit. 18, § 134:

Enforcement of duty.—The court shall have power to order any executor, administrator, collector, guardian, or testamentary trustee, who appears to be in default in respect to the rendering of any inventory or account or the fulfillment of any duty in said court to be summoned to appear therein and fulfill his duty in the premises, on pain of revocation of his power to act; and on his appearing the court may pass such order as may be just; and upon his failure to appear, after having been duly summoned, may revoke his power to act and make such further order and other appointment as justice may require. In case the summons to appear is returned by the marshal "not to be found," an alias summons shall be mailed to the last known post-office address of such fiduciary or served upon his attorney of record, if he be within the jurisdiction of the court; and on the failure of such fiduciary to appear, the court may revoke his power to act and make such further order and other appointment as justice may require. (Mar. 3, 1901, 31 Stat. 1210, c. 854, sec. 126; Apr. 19, 1920, 41 Stat. 557, c. 153.)

D. C. Code (1929) tit. 18, § 136:

Enforcement of judgments, etc.—The said court, in addition to the powers herein specially conferred, shall have power to enforce its judgments, orders, and decrees in like manner as orders and decrees may be enforced in the equity court. (Mar. 3, 1901, 31 Stat. 1211, c. 854, sec. 129; June 30, 1902, 32 Stat. 526, c. 1329.)

D. C. Code (1929) tit. 29, § 89:

Resignation.—If any person, after having accepted the office of executor or administrator, shall desire to

retire from and resign the same, he may file his petition to that effect, accompanied by a full and particular account, under oath, of his receipts and disbursements, if any, and the court shall thereupon direct such notice as it may think proper to be given of said application, and, if no cause be shown to the contrary, may release and discharge him from his office and pass such order as to costs and commissions and impose such terms in other respects as the nature of the case may require: *Provided*, That such executor or administrator shall not, by said discharge, be released from any liability for past acts, defaults, or omissions of duty. (Mar. 3, 1901, 31 Stat. 1235, c. 854, sec. 292.)

D. C. Code (1929) tit. 29, § 154:

When powers to cease.—On the granting of letters testamentary or of administration the power of any such collector shall cease, and it shall be his duty to deliver, on demand, all the property and money of the decedent in his hands, except as before excepted, to the person obtaining such letters, and the executor or administrator may be permitted to prosecute any suit commenced by said collector as if the same had been begun by said executor or administrator, and may also defend any suit brought against said collector by any creditor of the deceased. (Mar. 3, 1901, 31 Stat. 1238, c. 854, sec. 307; Apr. 19, 1920, 41 Stat. 562, c. 153.)

D. C. Code (1929) tit. 29, § 253:

Concealment of assets by strangers.—If an executor, administrator, or collector shall believe that any person conceals any part of his decedent's estate, he may file a petition in said court alleging such concealment, and the court may compel an answer thereto on oath; and if satisfied, upon an examination of the whole case, that the party charged has concealed any part of the estate of the deceased, the court may order the delivery thereof to the executor, administrator, or collector, and may enforce obedience to such order in the same manner in which orders of said court may be enforced. (Mar. 3, 1901, 31 Stat. 1209, c. 854, sec. 122.)

D. C. Code (1929) tit. 29. § 254:

Concealment by executor or administrator.—If any person interested in any decedent's estate shall by petition allege that the executor, administrator, or collector has concealed or has in his hands and has omitted to return in the inventory or list of debts any part of his decedent's assets, and the court shall finally adjudge and decree in favor of the allegations of the petition, in whole or in part, it shall order an additional inventory or list of debts, as the case may be, to be returned by the executor, administrator, or collector, and appraisement to be made accordingly, to comprehend the assets omitted, and the court may compel obedience to said order, and, if the same is not complied with, revoke the letters testamentary or of administration or of collection and order the bond of the executor, administrator, or collector to be put in suit. (Mar. 3, 1901, 31 Stat. 1210, c. 854, sec. 124.)

Probate Rule 10. Manner of Service and Return:

Subject to the provisions of Rule 1, paragraph 2 of the Rules of Civil Procedure of this Court service of any notice of trial of issues, with a copy of said issues, and service of any subpoena or summons to answer, with a copy of the bill or petition to be answered, shall be made as provided in this rule:

1. *By Whom Served.*—Service shall be made by a United States marshal or his deputy, or by some person specially appointed by the court for that purpose.

2. *Personal Service Within the District of Columbia.*—Service shall be made within the District of Columbia in the manner provided for personal service of the summons issued upon a complaint in the Civil Division of this court.

Probate Rule 13. Service and Filing of Pleadings and Other Papers:

Except as may be otherwise provided in these rules, all pleadings and other papers shall be served and filed in like manner as provided in Rule 5 of the Federal Rules of Civil Procedure. Proof of such service shall be made before any of such pleadings or other papers

will be considered by the court. The filing of an acknowledgment of service will be sufficient or in lieu thereof a statement of the attorney attached to or appearing on the original papers when filed, clearly stating the time and manner in which service was made will be accepted as *prima facie* proof of service.

Rule 1 of the Rules of Civil Practice of the District Court:

* * *

2. In the determination of contested issues of law or fact, or of law and fact, in probate, adoption and lunacy proceedings, these Rules and the Federal Rules of Civil Procedure, as now or hereafter in force, shall also govern the procedure on motions, depositions, discovery and testimony, and at the hearing or trial of such issues.

Rule 5 (b) of the Federal Rules of Civil Procedure. Service and Filing of Pleadings and Other Papers:

* * *

How Made.—Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

ISSUES

I

(a) Whether the Probate Court properly can assume jurisdiction to determine title to specific assets claimed by both an estate and a deposed executor.

(b) Whether *habeas corpus* properly can attack, collaterally, jurisdictional defects in a turn-over order, disobedience of which occasioned the contemnor's commitment.

II

(a) Whether a rule to show cause issued in a contempt proceeding can be served on a contemnor by leaving it with an adult at his residence.

(b) Whether personal service can be dispensed with when the Probate Court already has personal jurisdiction by virtue of prior probate proceedings.

III

(a) Whether examination of a turn-over order reveals any inconsistencies between it and a prior jury verdict on which it was based.

(b) Whether there is a fatal inconsistency in the fact that a turn-over order was based upon the petition of one of the collectors of an estate, whereas the contempt proceeding was based upon the petition of a present executor.

(c) Whether *habeas corpus* proceedings can review mere irregularities and inconsistencies in either a turn-over order or a contempt commitment.

IV

(a) Whether a turn-over order provides for concurrent and coexistent remedies, or for inconsistent alternative remedies; and if the former, whether an election of remedies is necessary.

(b) Whether enforcement of a turn-over order by commitment for contempt constitutes imprisonment for debt.

SUMMARY OF ARGUMENT

I

(a) The Probate Court had jurisdiction to determine title to specific assets claimed by both the estate and the deposed executor. Cases decided by this Court to the effect that the Probate Court has no jurisdiction to try title to property, all involve situations where a third party, as a stranger to probate proceedings, has attempted to assert an interest in

certain property also claimed by the estate. These cases constitute proceedings brought under § 253, tit. 29, D. C. Code (1929). However, in proceedings brought under § 254, tit. 29, D. C. Code (1929), involving situations where an executor has unlawfully "concealed" certain assets of the estate and has refused to account therefor, the Probate Court does have jurisdiction to determine title to specific assets and can order such assets turned over to the authorized representative of the estate. This rule is well established in decisions of the courts of Maryland, where Code provisions exist which are substantially identical with the applicable provisions of the District of Columbia Code; furthermore, this rule represents the majority view in other jurisdictions.

(b) Whether the Probate Court properly assumed jurisdiction or not, it is submitted that the issue is not now open to collateral attack by a writ of *habeas corpus* brought in the contempt proceeding. This position is sustained by a recent federal case squarely in point. *United States v. Jaeger*, 117 F. (2d) 483 (C. C. A. 2d). Under the doctrine of the cited case, the issue of jurisdiction over the subject matter, when once determined, either expressly or by necessary implication, becomes *res judicata*, and such determination is not thereafter subject to collateral attack. This proposition represents a logical extension of the doctrine of *res judicata*, as sanctioned by a series of recent United States Supreme Court cases.

II

(a) The rule to show cause in the contempt proceeding was properly served on an adult at the contemnor's residence. This method of service was in substantial compliance with Rule 5 (b) of the Federal Rules of Civil Procedure. The latter Rule is made applicable to the Probate Court by virtue of Rule 13 of that court, and also by Rule 12, paragraph 2, of the Rules of Civil Practice of the District Court. (1)

(b) In any event, under the facts of the present case, formal personal service of process was not necessary. The contemnor had voluntarily submitted himself to the jurisdiction of the Probate Court in the prior probate proceedings; therefore all that was necessary in the contempt proceeding was appro-

priate notice. This principle was made clear by the United States Supreme Court in *Leman v. Krentler-Arnold Company*, 284 U. S. 448.

III

(a) An examination of the turn-over order reveals no inconsistencies. Specifically, the appellant contends that the jury verdict, stating that certain assets had been "disposed of," was inconsistent with the subsequent order of the Probate Court directing the assets to be turned over to one of the collectors of the estate. But this Court, if possible, will construe the verdict and order to give a sensible meaning, consonant with the apparent intent of the jury and the court. The use of the phrase "disposed of" is consistent with the thought that something might be retained in possession even though disposed of "otherwise than by application to the use of" the decedent. Also, the verdict was in accordance with appellant's testimony that he still retained the assets but had treated them as his own.

(b) No inconsistency exists in the fact that the turn-over order was based upon the petition of one of the collectors of the estate, whereas the contempt proceeding was based upon the petition of the present executor. The appellant argues that because of the alleged inconsistency, he has no present means of purging himself of his contempt, since the turn-over order directed the assets to be turned over to the then collectors of the estate, who are now no longer in existence. But this argument is obviously frivolous, and is in direct conflict with § 154, tit. 29, D. C. Code (1929), which provides that an executor succeeds to all rights and powers of a former collector.

(c) In any event, the contention that the turn-over order contained certain inconsistencies, also the contention that inconsistencies existed between the turn-over order and the contempt commitment, are not well taken. It is elementary that *habeas corpus* attacks only jurisdictional defects. Objections to alleged irregularities and inconsistencies in either the turn-over order or the contempt commitment must be raised by an appeal.

IV

(a) The fact that appellee obtained a judgment, with execution at law, for the value of the eloigned assets, was not inconsistent with the subsequent enforcement of that part of the decree directing the turn-over of specific assets. The decree of the Probate Court provided for concurrent and coexistent remedies, and therefore no election was required. Election of remedies is a doctrine not favored in equity, and will be applied only in cases where actual double compensation is threatened.

(b) Enforcement of the turn-over order did not constitute imprisonment for debt. The applicable Code provision prohibits imprisonment for disobedience of a decree directing only "the payment of money." It is well established by both federal and state decisions that an order for payment of specific assets directed at a person holding a fiduciary relationship to such assets does not fall within a prohibition against imprisonment for debt.

ARGUMENT

I

(a) Probate Court had jurisdiction to determine the title to specific assets claimed by both the estate and the deposed executor

As hereafter indicated, it is the position of the appellee that in a proceeding of this character, the jurisdiction of the Probate Court to enter the turn-over of October 29, 1937, is not subject to collateral attack. However, assuming, for purpose of argument, that the question is still an open one, it is submitted that under the facts of the present case the Probate Court properly exercised its jurisdiction to determine title to certain specific assets claimed by both the estate and the deposed executor.

As set forth in the statement of facts, one of the duly qualified collectors of the estate filed a petition for rule to show cause in the Probate Court on May 20, 1937. Among other things, the petition alleged: that the appellant had in his possession certain assets of the estate which, according to the estimate of appellant himself, amounted to approximately \$20,500; that although appellant was nominated sole executor and sole beneficiary in a purported testamentary writing, said writing was denied probate; that, although often requested so to do, the appellant had failed to turn over the assets previously represented as part of the estate; that according to the information of the petitioner, appellant had "concealed" the assets and had failed to pay all of the debts and expenses of the last illness and funeral of decedent; that it was for the best interest of the estate that the appellant be required to transfer and deliver to the collectors all of the assets of the estate; and that all funds collected by appellant, as executor, should be accounted for to the Probate Court.

Parenthetically, it should be noted that the foregoing petition was *filed by a collector* of the estate and alleged *concealment of assets by the appellant, as executor*. It is clear, therefore, that the petition was intended as a proceeding under D. C. Code (1929), tit. 29, § 254, which section authorizes

"any person interested" in the estate of a decedent, to file a petition alleging that the executor "has concealed or has in his hands and omitted to return in the inventory or list of debts any part of his decedent's assets." And this section further provides that the Probate Court "shall finally adjudge and decree in favor of the allegations of the petition, in whole or in part," and shall require an additional inventory to be made comprehending the assets omitted. Particular attention is called to the fact that the foregoing petition was *not* intended as a proceeding under D. C. Code (1929), tit. 29, § 253, which section authorizes *an executor to file a petition alleging concealment of assets of the estate by a stranger*.

In accordance with the prayer of the collector's petition, the Probate Court issued a rule to show cause, dated May 25, 1937. Appellant filed an answer to the rule, and later two amended answers. In substance, the several answers alleged that the specific assets in question were the subject of a gift between the deceased and the appellant. Thereafter, the Probate Court entered an order framing issues for trial by a jury as to whether or not there was in fact a valid gift of the disputed assets. This trial resulted in a verdict for the collector. Accordingly, the Probate Court entered a decree and order dated October 29, 1937, directing transfer and delivery of the assets to the collectors.

Appellant now contends that the Probate Court was without jurisdiction to enter the turn-over order of October 29, 1937, directing transfer of the specific assets of the estate, since entry of the order necessarily involved a determination of title to the assets claimed by both the estate and the deposed executor. This contention is based upon a series of cases decided by this Court, which appellant claims stand for the general proposition that the Probate Court has no jurisdiction to determine title to property. *Cook v. Spear*, 13 App. D. C. 446; *Richardson v. Daggett*, 24 App. D. C. 440; *Jones v. Dunlap*, — App. D. C. —, 115 F. (2d) 689; *Holzbeierlein v. Grant*, — App. D. C. —, 117 F. (2d) 26.

It is respectfully submitted, however, that the cases cited do not support the appellant's contention under the particu-

lar facts of the present case, since all of the cases cited involve the assertion of title by third parties who made their appearance as strangers to the probate proceedings. In none of the cases cited did a person already occupying a fiduciary relationship to the estate attempt to assert an independent title to assets previously represented by him to be part of the estate. And in none of the cases cited was the person asserting title already within the jurisdiction of the Probate Court prior to making his claim. To illustrate: In *Cook v. Spear*, a creditor of the estate entered his appearance as a stranger to the probate proceedings and asserted title and right to certain funds claimed by the estate. In *Richardson v. Daggett*, certain persons, identified as the next of kin of the intestate, asserted title to certain property in their hands, in reply to a petition filed in the probate court by representatives of the estate alleging unlawful concealment of the assets in question. In *Jones v. Dunlap*, a guardian of a minor asserted the right to possession of certain funds claimed by another as trustee of an active trust for the benefit of the minor. In *Holzbeierlein v. Grant*, the widow of a testator renounced her interest under the will and asserted title to certain securities held by the executors.

In all of the foregoing cases, therefore, the proceedings were either expressly or tacitly understood to be proceedings under § 253, tit. 29, D. C. Code (1929). For example, in *Richardson v. Daggett*, the petition filed by representatives of the estate was specifically described as a petition brought under § 122, D. C. Code (1901) [now § 253, tit. 29, D. C. Code (1929)]. Under this section, as previously noted, an executor or administrator may file a petition alleging concealment of assets of the estate, *against any third party or stranger believed to possess such assets*. Of course, if such stranger denies, in good faith, the right of the estate to the assets in his possession, then the Probate Court has no jurisdiction to proceed with the dispute. Such has been the law under this particular section of the Code ever since it became part of the law of the District of Columbia in 1901, and prior to that time a similar section in the Maryland Code received a like interpretation. See Maryland Code (1939), Art. 93, § 252, and the following cases thereunder:

Daugherty v. Daugherty, 82 Md. 229, 33 A. 541.

Gibson v. Cook, 62 Md. 256.

Cf. Linthicum v. Polk, 93 Md. 84, 48 A. 842.

But the proceedings in the present case, as before noted, were brought under § 254, tit. 29, D. C. Code (1929), as distinguished from proceedings under § 253. Proceedings under § 254 are properly brought by "any person interested in any decedent's estate," where there has been a "concealment" or an omission to account for assets of the estate by an executor. And in such a proceeding, it is submitted, the Probate Court does have jurisdiction to determine title to specific assets claimed by a fiduciary agent.

Apparently this Court has never heretofore directly considered this particular problem. But this Court consistently has recognized that as against an administrator or executor, there is no necessity for a resort to a court of equity for either a discovery or an accounting in respect to the assets of the estate of the deceased, inasmuch as the Probate Court traditionally has exercised exclusive jurisdiction over this subject. *Mann v. McDonald*, 3 App. D. C. 456, 460; *Street v. Stubblefield*, 57 App. D. C. 276, 20 F. (2d) 1017. So, also, this Court has recognized the power of the Probate Court to pass on a personal claim of an executor or administrator against the estate. *Nicholls v. Hodges' Executor*, 1 Pet. 562; *In Re Estate of Atwood*, 2 App. D. C. 74. Still other cases have been considered by this Court, which, although going off on some other point of law, nevertheless have involved situations where an administrator or executor has asserted a claim of title to certain personal property of the estate. Concededly, these cases did not directly rule upon the question of the Probate Court's jurisdiction, but jurisdiction was assumed in these cases, and therefore by implication at least, was approved. See *Brosnan v. Brosnan*, 53 App. D. C. 149, 289 F. 547; *Myers v. Tschiffely*, 64 App. D. C. 17, 73 F. (2d) 657; *Casey v. Topliffe*, 65 App. D. C. 100, 80 F. (2d) 543.

As indicated, however, counsel has been unable to find any case decided by this Court directly involving the ques-

tion of the jurisdiction of the Probate Court to try title to personal property in a proceeding brought under § 254, tit. 29, D. C. Code (1929). Therefore, it is necessary to examine the status of the Maryland law with reference to this problem. Since the Probate Court of the District of Columbia is a successor of the Orphans' Court of Maryland, and since the testamentary laws of this jurisdiction were adopted, in substance, from Maryland, interpretations of the courts of that state, while not controlling, are highly persuasive. *Hawley v. Hawley*, 72 App. D. C. 376, 380, 114 F. (2d) 745, 749; *Clawans v. Sheetz*, 67 App. D. C. 366, 369, 92 F. (2d) 517, 520.

In Maryland there are two pertinent sections of the Code of that state which govern the filing of petitions to reach concealed assets, namely §§ 13 and 12, ch. 315, Laws of Maryland 1831 [now §§ 252 and 253, Md. Code (1939)]. An examination of §§ 252 and 253 of the Md. Code will reveal that they are substantially identical with §§ 253 and 254, tit. 29, D. C. Code (1929). It is reasonable to assume, therefore, that the pertinent sections of the D. C. Code, which sections formed a part of the original Code adopted in 1901, were appropriated from the laws of Maryland and made part of the organic act of the District of Columbia. The parallel sections of both the Maryland and the District Codes are set forth in the margin below.¹

¹ Md. Code, Art. 93, § 252:

If an administrator shall believe that any person conceals any part of his decedent's estate he may file a petition in the orphans' court of the county in which he obtained administration, alleging such concealment, and the court shall compel an answer thereto on oath; and if satisfied upon an examination of the whole case that the party charged has concealed any part of the personal estate of the deceased, may order the delivery thereof to the administrator, and may enforce obedience to such order by attachment, imprisonment or sequestra-

D. C. Code, tit. 29, § 253:

Concealment of assets by strangers.—If an executor, administrator, or collector shall believe that any person conceals any part of his decedent's estate, he may file a petition in said court alleging such concealment, and the court may compel an answer thereto on oath; and if satisfied, upon examination of the whole case, that the party charged has concealed any part of the estate of the deceased, the court may order the delivery thereof to the executor, administrator, or collector, and may enforce obedience to such order in the same manner

Under § 252, Art. 93, Md. Code (1939), it is well settled that the Orphans' Court has no jurisdiction to settle disputes concerning title to property when such title is asserted by a third person who appears as a stranger to the estate. *Daugherty v.*

tion of property. (Laws of Md. 1831, c. 315, sec. 13.)

Md. Code, Art. 93, § 253:

The provisions of the foregoing section are extended to all cases where any person interested in any decedent's estate shall by bill or petition allege that the administrator has concealed, or has in his hands and has omitted to return in the inventory or lists of debts any part of his decedent's assets; and if the court shall finally adjudge and decree in favor of the allegations of such petition or bill, in whole or in part, they shall order an additional inventory, or list of debts, as the case may be, to be returned by the administrator, and appraisement to be made accordingly, to comprehend the assets omitted; and such additional inventory or list of debts shall have the same effect to all intents and purposes as any inventory or list of debts before returned; and the court may compel obedience to the said order by attachment and imprisonment and sequestration of property; and if the said administrator shall, either before or after such process of attachment, imprisonment and sequestration, fail to comply with such order, his letters of administration may be revoked, and the court may direct his bond to be put in suit; and the assets ordered to be comprised in such additional inventory or list of debts shall be decreed and taken to be within the condition of said bond. (Laws of Md. 1831, c. 315, sec. 12.)

in which orders of said court may be enforced. (Mar. 3, 1901, 31 Stat. 1209, c. 854, sec. 122.)

D. C. Code, tit. 29, § 254:

Concealment by executor or administrator.—If any person interested in any decedent's estate shall by petition allege that the executor, administrator, or collector has concealed or has in his hands and has omitted to return in the inventory or list of debts any part of his decedent's assets, and the court shall finally adjudge and decree in favor of the allegations of the petition, in whole or in part, it shall order an additional inventory or list of debts, as the case may be, to be returned by the executor, administrator, or collector, and appraisement to be made accordingly, to comprehend the assets omitted, and the court may compel obedience to said order, and, if the same is not complied with, revoke the letters testamentary or of administration or of collection and order the bond of the executor, administrator, or collector to be put in suit. (Mar. 3, 1901, 31 Stat. 1210, c. 854, sec. 124.)

Daugherty, 82 Md. 229, 33 A 541; *Gibson v. Cook*, 62 Md. 256. But under § 253, Art. 93, Mr. Code (1939), it is equally well settled that the Orphans' Court does have jurisdiction to determine title to personal property where the claim is asserted by a fiduciary agent of the estate.

Linthicum v. Polk, 93 Md. 84, 93, 48 A. 842, 844;

Bowers v. Cook, 132 Md. 432, 104 A. 420;

Fulford v. Fulford, 153 Md. 81, 137 A. 487;

Anderson v. Curran, 155 Md. 538, 545, 142 A. 719, 722.

And see:

Fowler v. Brady, 110 Md. 204, 73 A. 15;

Pratt v. Hill, 124 Md. 252, 92 A. 543;

Talbot Packing Corp. v. Wheatley, 172 Md. 365, 190 A. 833.

In *Linthicum v. Polk*, *supra*, a petition was filed by the appellee in the Orphans' Court, alleging that the appellant, as executor of the estate of the deceased, had concealed and had omitted to return in the inventories to the court, certain money and other assets of the deceased's estate. The Petition prayed that the appellant be required to bring into court the money and other personal property belonging to the estate, and that she be required to return an additional inventory of the assets omitted. The appellant filed an answer asserting title to part of the property of the estate, in consequence of which she contended that the Orphans' Court had no jurisdiction over the matter. Accordingly, the Orphans' Court entered an order dismissing the appellee's petition for want of jurisdiction.

Upon appeal, it was held that the Orphans' Court did have jurisdiction to entertain the appellees' petition, by virtue of the provisions of Sec. 238 of Art. 93 [now Md. Code (1939) Art. 93, § 253] under which section any person interested in any decedent's estate shall by bill or petition allege that the administrator [or executor]² has concealed, or has in his hands and has omitted to return in the inventory or list of debts any part of his decedent's assets. It was held that this

² Although the Md. Code (1939), Art. 93, § 253, refers only to administrators, the section is made equally applicable to executors in § 5, Art. 1. See *Baker v. Forsythe*, — Md. —, 16 A. (2d) 921.

section was applicable even though the administrator claimed title to the property sought to be reached by such proceeding. The court said:

* * * the object of section 239 [now section 253] is to require the administrator to account *in the Orphans' Court* for all property of his decedent. He is, by virtue of his qualification as an administrator, *in that Court*, and he is presumed to take all of his decedent's personalty into that Court and to *there* account for it. He being already there and the person interested in the decedent's estate voluntarily coming into it, there is not the same reason for denying the Orphans' Court jurisdiction to determine questions between them, as there is when the administrator undertakes to bring into that Court one who is not already there. But, apart from that, the Orphans' Court is the one where the inventory and list of debts are to be filed and, if the administrator does not file correct inventories of lists of debts, can there be any reason why the Orphans' Court should not have authority to compel him to do so? Is that Court to be shorn of all power to compel administrators to file true and correct inventories and lists of debts on the mere allegation of the administrator that the property belonged to him? If the Orphans' Court cannot determine the question, what tribunal can? The title to property of the decedent is in the administrator. No one could maintain an action of replevin, trover, or other action to test the title against him for the estate, for the simple reason that the title is in him as administrator, if the property belongs to the estate. If he has money belonging to the estate, who could sue to recover it in a court of law? Manifestly no one could, for the reason that no one but the administrator is entitled to recover the money due his decedent.

* * * * *

* * * It would, indeed, be scant justice if distributees, with a petition of this character, are to be turned

out of Court on the mere allegation of an administrator that the property referred to belonged to him, and not to the estate he represents. The law does not prohibit those interested in estates from going into the courts where they are to be settled, to demand proper accounting by administrators and executors.

In *Anderson v. Curran*, *supra*, the appellee, an administrator of the estate of the deceased, filed a bill of complaint in the Circuit Court of Baltimore City, alleging in substance that when the deceased died intestate on August 2, 1927, his widow, the appellant, was appointed administratrix; that the Orphans' Court revoked the appellant's letters of administration on October 26, 1927, and granted letters to the appellee; that the appellant still had in her hands certain personal property and assets of the decedent which she was claiming as her own. By way of relief, the bill prayed for various forms of equitable relief, among others, that the funds withheld be impressed with a trust and that certain banks be enjoined from permitting appellant to have access to funds therein. In answer to the foregoing complaint, the appellant demurred on the ground that the bill stated no grounds of relief. The Circuit Court passed an order restraining and enjoining the appellant as prayed, pending final determination of the cause.

Upon appeal, neither the appellant nor the appellee attempted to argue that the Orphans' Court had jurisdiction to give the relief prayed for. On the contrary, the appellee urged that equity afforded the only effectual remedies, whereas the appellant continued to insist on her demurrer to the bill of complaint. However, it was held that the Orphan's Court had the power under § 253, Art. 93, Md. Code (1939), to require the deposed administratrix to account for the property in her hands. The Court said that the duties of a deposed administratrix do not cease until an accounting has been had and delivery of the property of the estate to the remaining or new administrator had been made. Since the statutory duties of the deposed administratrix extended to the filing of her account and delivery of the property for which she was chargeable, the Orphans'

Court had authority to inquire whether she withheld or had in her possession or under her control personal property of her decedent. The Court held that the present case was analogous to that of *Linthicum v. Polk*, 93 Md. 84, and that the law of that case was controlling here, stating:

"The orphans' court is the one where the inventory and list of debts are to be filed, and if the administrator does not file correct inventories or lists of debts, can there be any reason why the orphans' court should not have authority to compel him to do so? Is that court to be shorn of all power to compel administrators to file true and correct inventories and lists of debts on the mere allegation of the administrator that the property belonged to him? If the orphans' court cannot determine the question what tribunal can?" What difference in principle can there be between a correct inventory and a correct account? Both contain statements of assets of an estate, and if the orphans' court can investigate, hear, and determine controversies as to the correctness of an inventory, why not as to the correctness of a deposed administrator's account, when it is by law made his duty to account for all personal property of his decedent up to the rendition of such account? If this were not true, administrators could capriciously decide what property should be accounted for and what withheld or appropriated, and by merely claiming title could oust the jurisdiction of the orphans' court. We are therefore of the opinion that the orphans' court has the power to ascertain and decide what property in the hands of the appellant belongs to her decedent for the reason that she is already "there" within the meaning of *Linthicum v. Polk*, *supra*.

* * * * *

In the instant case, the appellee has also alleged that the appellant "is claiming" the decedent's property "as her own." This is an admission by the appellant that she is withholding the property under a claim of title

in herself, and this we find is within the power of the orphans' court to inquire into, as the appellant is already there and must account and deliver to her successor administrators if the orphans' court shall so order.

It is respectfully submitted by the appellee, that the same distinction recognized by the Maryland courts with reference to petitions brought under §§ 252 and 253, Art. 93, Md. Code (1939), is applicable to comparable proceedings in the District of Columbia; that is, the Probate Court has *no jurisdiction* to determine title to property in proceedings brought under § 253, tit. 29, D. C. Code (1929), but the Probate Court *does have jurisdiction* to determine title to property in proceedings brought under § 254, tit. 29, D. C. Code (1929).

In most American jurisdictions this same distinction has been recognized with reference to the jurisdiction of probate courts to try title to property. This is substantiated by an annotation contained in 90 A. L. R. 134 entitled "Jurisdiction of Probate Court to Determine Title to Property Which Personal Representative Claims in His Own Right." According to this annotation, there is both a majority and a minority rule. The majority rule is that "a court sitting in probate has jurisdiction to determine the title to property which the personal representative claims in his own right." As illustrating this majority rule, the annotation contains cases from California, Illinois, Maryland, Missouri, New Jersey, New York, Pennsylvania, Washington, and Wyoming. See especially *Tome's Appeal*, 50 Pa. 285; *Ex parte Cohn*, 55 Cal. 193; *Harrigan v. Stone*, 237 Ill. App. 314.

It is contended by the appellant that he assumed the status of a stranger to the estate upon the termination of the will contest, since the paper writing propounded by him, in which he was named executor, was held invalid. In effect, appellant's argument amounts to a contention that the unfavorable termination of the will contest absolutely relieved him of any liability to account to the Probate Court for the assets of the estate, even after the appellant himself had represented that the deceased was possessed of assets approximating \$20,500

at the time of his death. This contention is, of course, contrary to both common sense and legal learning. If the appellant had desired to release himself from his fiduciary liability, he should have filed a petition of resignation, together with an accounting, in accordance with the express statutory provisions of § 89, tit. 18, D. C. Code (1929). Even though the executor had never been confirmed by the Probate Court, nevertheless he had entered upon certain duties and assumed certain powers derived from the mere fact of his nomination as executor. See *Hutchins v. Hutchins*, 48 App. D. C. 286, 291; also *Tuohy v. Hanlon*, 18 App. D. C. 225. Consequently, he had a very obvious duty to account to the Probate Court during the period of his trusteeship. In the *Hutchins* case, *supra*, the Court said:

* * * the distinction sought to be made * * * between the duty of executors before and after probate is totally without merit. An executor derives his appointment from the testator, which appointment is approved and letters testamentary are issued as an incident of the probate proceedings. Hence, the contention that he is not an executor until after probate is a fictitious assumption. He is an executor for the duties to be performed before probate to exactly the same extent that he is an executor for the duties to be performed after probate.

In this connection it should be recalled that the Maryland Court of Appeals faced the same problem in *Anderson v. Curran*, *supra*. However, the Maryland court refused to recognize any distinction between the duties of an acting administrator and a deposed administrator with reference to the duties of each to make a full accounting to the Orphans' Court. Of course, as a matter of fact, there is even less reason to make a distinction between duly confirmed executors and deposed executors, than between duly confirmed administrators and deposed administrators. As pointed out in the *Hutchins* case, an executor derives his power from the mere fact of nomination in the will, whereas an administrator derives his power through appointment by the court. In other words, an ex-

ecutor is vested with much wider powers of discretion and enters upon his duties immediately upon the death of the testator. Accordingly, he should be even more meticulously bound to make a complete accounting to the Probate Court. Cf. *Hawley v. Hawley*, 72 App. D. C. 357, 114 F. (2d) 505.

(b) Question of the Probate Court's jurisdiction to enter the turn-over order is not properly before the Court in the present habeas corpus proceeding

As pointed out in the foregoing section of this brief, the appellee submits that the Probate Court had full authority to enter the turn-over order of October 29, 1937, under which title to certain specific assets of the estate was determined. However, the appellee further submits, that even if it be assumed that the Probate Court exceeded its jurisdiction in entering the turn-over order, such question is not now open to collateral attack by means of a writ of *habeas corpus* brought to secure release from the contempt commitment.

In effect, appellant's contention is an argument that the contempt commitment was void because it was based upon disobedience of the turn-over order, which in turn was void. Although appellant fails to cite any authority for this proposition, it must be conceded that some support does exist in certain *dictum* in an early Supreme Court case, *Ex parte Fisk*, 113 U. S. 713, 718 (1885), where it was said:

When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this

court will, in the language of the statute, make "inquiry into the cause of the restraint of liberty."

See also *Ex parte Rowland*, 104 U. S. 604.

It should be noted that the alleged jurisdictional defect in the turn-over order of October 29, 1937, consisted of an assumption of jurisdiction by the Probate Court to determine title to certain specific assets of the estate of Ernst G. Fischer, which assets were claimed both by the estate and by the appellant, the deposed executor. In entering the turn-over order, the Probate Court necessarily adjudicated the issue of its jurisdiction over the subject matter of that proceeding. The appellant noted an appeal in open court from that order, and, although he had full opportunity to prosecute his appeal, he failed to do so.

The appellee submits that this determination by the Probate Court of its jurisdiction, as contained in its order of October 29, 1937, rendered the issue of jurisdiction *res judicata* in all subsequent proceeding. And, under the authority of a line of recent United States Supreme Court cases, the order of October 29, 1937, is not subject to collateral attack by the present *habeas corpus* proceedings, which properly challenges only jurisdictional defects in the contempt commitment. It is respectfully suggested, therefore, that the above-quoted language from *Ex parte Fisk, supra*, must give way to the more recent line of authority hereafter cited, which holds that a jurisdictional issue once determined is *res judicata*, and that in subsequent proceedings the prior determination is shielded from collateral attack.

Stoll v. Gottlieb, 305 U. S. 165;

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371;

Jackson v. Irving Trust Company (January 6, 1941), 85 L. ed. 310;

United States v. Jaeger, 117 F. (2d) 483 (C. C. A. 2d).

And see:

Note (1940) 49 Yale L. Rev. 959;

Note (1940) 53 Harvard L. Rev. 652, 659;

Jurisdiction and Collateral Attack: October Term, 1939 (1940) 40 Columbia L. Rev. 1006.

In *Stoll v. Gottlieb*, *supra*, it was held that where the issue of whether or not a bankruptcy court could release from his guarantee a guarantor in reorganization was once decided in favor of the court's jurisdiction, even if the decision in favor of jurisdiction was erroneous and the matter was without the power of a bankruptcy court, nevertheless, the issue could not again be raised collaterally. In *Chicot County Drainage District v. Baxter State Bank*, *supra*, in a subsequent suit plaintiffs were held bound by a prior final decree in bankruptcy based upon a statute later held unconstitutional, since plaintiffs had not originally contested or appealed the question of the court's jurisdiction in the bankruptcy proceedings, although they had full notice and opportunity to do so. In *Jackson v. Irving Trust Company*, *supra*, a prior decree of a federal district court ordering payment of a debt of property in the hands of the alien property custodian was held not to be subject to collateral attack. The court said that whether or not the particular issue of jurisdiction was actually litigated was immaterial, "in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree."

It cannot be denied that the foregoing cases constitute a very marked extension of the doctrine of *res judicata* into the field of jurisdictional determinations. Undoubtedly the Supreme Court has effectively disposed of the old saw that "jurisdiction over the subject matter may not be waived." The recent cases definitely place the burden upon the parties to raise the issue of subject-matter jurisdiction in the original proceeding, otherwise they will be deemed to have waived the issue. The implications of this doctrine are interestingly discussed in several recent law-review articles above cited.

In at least one federal case the doctrine of the recent Supreme Court cases has been applied to a factual situation analogous to the present case. *United States v. Jaeger*, 117 F. (2d) 483 (C. C. A. 2d). In that case a writ of *habeas corpus* was issued to secure a relator's release from commitment for contempt. The commitment was based upon the relator's failure to comply with an order of the bankruptcy court that he pay over certain moneys in connection with a prior bankruptcy proceeding. The realtor contended that the turn-over order was void, as being beyond the jurisdiction of the bankruptcy court. It appeared, however, that in both the bankruptcy proceedings and in the contempt proceedings, the relator had raised the question of the jurisdiction of the bankruptcy court to enter the turn-over order; but in each instance the question had been decided in favor of the court's jurisdiction. Nevertheless, the relator again raised the question in a *habeas corpus* proceeding to secure his release from the commitment for contempt, but the Circuit Court of Appeals for the Second Circuit held that, even if it be assumed that the previous determinations of jurisdiction were erroneous, nevertheless the matter was settled against collateral attack. This conclusion was arrived at on the basis of the recent Supreme Court authorities referred to.

It is submitted that the present case falls squarely within the rule of the *Jaeger* case. The rule of that case requires the conclusion that the jurisdiction of the Probate Court to enter the turn-over order in the present case is not now subject to collateral attack by a writ of *habeas corpus* brought in the contempt proceeding. Even the appellant concedes that the Probate Court necessarily adjudicated the issue of its jurisdiction when the Court entered its order of October 29, 1937, directing appellant to turn over the disputed assets. At that time the issue of jurisdiction was necessarily involved, and the appellant had full opportunity to dispute it. After the decree was entered, appellant formally noted an appeal in open court, but never prosecuted such appeal. Therefore, the prior determination of the jurisdictional question is *res judicata* in the present proceedings.

In modern times there is a practical necessity for making an end to litigation. The Supreme Court apparently has recognized this need in recent cases, by extending the doctrine of *res judicata* to jurisdictional determinations over the subject matter.

II

(a) The rule to show cause in the contempt proceeding was properly served by leaving it with an adult at the contemnor's premises

The appellant contends that the Probate Court lacked jurisdiction to issue its decree for contempt, because of the fact that appellant was not personally served with a copy of the rule to show cause issued June 28, 1939, in the contempt proceeding. In reply to this contention, the appellee submits: (a) that the rule to show cause was properly served in accordance with the rules of the Probate Court; and (b) that in any event, personal service of the rule to show cause was not necessary, since the Probate Court already had jurisdiction over the appellant by virtue of the prior probate proceedings.

(a) As set forth in the statement of facts, one Bouis, the duly confirmed executor of the estate of Ernst G. Fischer, filed a petition in the Probate Court, pointing out that appellant had failed to turn over any of the assets of the estate, as directed by the order of the Probate Court entered October 29, 1937. The petition prayed that a rule to show cause should issue, inquiring why appellant should not be adjudged in contempt for his failure to comply with the Probate Court's order of October 29, 1937. The rule to show cause was issued, and at the bottom of the typewritten rule, the following notation was made by the United States Deputy Marshal:

Served a copy of the within above rule * * * on the above-named Henry J. Watkins, Jr., Sept. 19, 1939, personally, by serving Mrs. Watkins (adult on the premises) personally as directed by attorney. John

B. Colpoys, United States Marshal in and for the District of Columbia. By Francis M. Goetzinger, Deputy United States Marshal (R. 409).

It is respectfully submitted that the form of service noted by the Deputy Marshal fully complied with the rules of the Probate Court, with the Rules of Civil Practice of the District Court for the District of Columbia, and also with the Federal Rules of Civil Procedure. It is true, as pointed out by the appellant, that Rule 81 (a) (1) of the Federal Rules of Civil Procedure provides that "These rules * * * do not apply to probate * * * proceedings in the District Court of the United States for the District of Columbia * * *". However, the District Court itself, in its Rules of Civil Practice, has adopted the Federal Rules of Civil Procedure with reference to its probate practice. Rule 1, par. 2, of the District Court provides that "In the determination of contested issues of law or fact, or of law and fact, *in probate* * * * these rules and the Federal Rules of Civil Procedure, as now or hereafter in force, shall also govern the procedure on motions, depositions, discovery and testimony, and at the hearing or trial of such issues." Under the Federal Rules of Civil Procedure, Rule 5 (b) prescribes the proper procedure for service of process, and as the Rules of Civil Practice of the District Court contain no other provision with reference to service, Rule 5 (b) must necessarily control service of process in probate practice. This conclusion is further confirmed by the provisions of Rule 13 of the Probate Court, which specifically refers to Rule 5 of the Federal Rules of Civil Procedure, as follows:

* * * all pleadings and other papers shall be served and filed in like manner as provided in Rule 5 of the Federal Rules of Civil Procedure. Proof of such service shall be made before any of such pleadings or other papers will be considered by the Court. The filing of an acknowledgement of service will be sufficient or in lieu thereof a statement of the attorney attached to or appearing on the original papers when filed,

clearly stating the time and manner in which service was made will be accepted as *prima facie* proof of service.

Rule 5 (b) of the Federal Rules of Civil Procedure provides that:

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. *Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.* Service by mail is complete upon mailing. [Italics supplied.]

In the present case, there was clearly a substantial, if not a literal, compliance with the provisions of Rule 5 (b). The United States Deputy Marshal certified that a copy of the rule to show cause was personally served on appellant's wife, an adult on the premises that appellant previously had described as his residence. It seems apparent, therefore, that there is little merit to the appellant's argument of improper service in the present case, since both under the rules of the Probate Court and under the rules of the District Court, service of process is to be governed by the procedure prescribed by the Federal Rules of Civil Procedure.

The only objection that possibly could be urged to the manner of formal service in this case is that, so far as the record shows, service was made upon the appellant, rather than upon his attorney. Certainly, however, it can not be contended

that service of the appellant, himself, in accordance with Rule 5 (b), was any less efficacious than service on his agent. If anything, service on the principal, rather than on his attorney, was an over-zealous compliance with the Rule.

(b) Personal service not necessary, since appellant already had submitted to the jurisdiction of the Probate Court in prior proceedings

In any event, appellant's contention of lack of proper service is without merit, for the reason that all that the appellant was entitled to in the present case was appropriate notice of the rule to show cause, as distinguished from formal personal service. The issuance of the rule to show cause, inquiring why appellant should not be adjudged in contempt of court, was not a new and independent proceeding, but merely a continuation of the proceeding which culminated in the turn-over order of October 29, 1937, which appellant had disregarded. In turn, the decree of October 29, 1937, was based upon a rule to show cause issued upon the petition of one of the collectors of the estate of Ernst G. Fischer, and in reply to which the appellant had made three different answers. No contention can be, nor is made, that appellant was not a party to the decree of October 29, 1937. And since the rule to show cause issued in the contempt proceeding was merely a continuation of the turn-over order of October 29, 1937, the appellant cannot now escape the consequence of the Probate Court's attempt to enforce its own prior order, by making technical objections to the manner of service.

This same point was carefully considered and settled by the United States Supreme Court in *Leman v. Krentler-Arnold Company*, 284 U. S. 448 (1932). That case involved a contempt proceeding for violation of a permanent injunction granted in an infringement suit. The respondent in the contempt proceeding had originally invoked the jurisdiction of the District Court by the filing of a bill of complaint seeking relief from alleged infringements of respondent's patents. The bill of complaint was dismissed and a counter-

claim of the defendant was upheld and a final decree was entered perpetually enjoining the respondent from making or using defendant's patents. Thereafter, the respondent placed upon the market an item which the defendant, as petitioner in a further proceeding for contempt, claimed to be an infringement and a violation of the original decree. A rule to show cause was served upon the respondent by delivery of a copy to its attorney of record and by mailing copies to the respondent at its out-of-state office in Michigan. The respondent then appeared specially in the contempt proceeding and moved to dismiss the petition for lack of jurisdiction over the respondent. Upon hearing, the District Court held the respondent to be guilty of civil contempt, and ordered a reference to a master to take an account of the profits. On the master's report, the District Court entered a decree for the recovery by the petitioner of some \$39,000.

Upon appeal, the United States Supreme Court held that when the respondent originally brought the suit in the District Court, it submitted itself to the jurisdiction of that court with respect to all the issues embraced in the suit, including those pertaining to the counterclaim of the defendant; that the decree upon the counterclaim bound the respondent personally; that it was a decree which operated continuously and perpetually in relation to the prohibited conduct; that disobedience constituted contempt of the court which rendered the decree; that in view of the nature and effect of the decree, it could not be said that the suit was terminated in the sense that the court had no further relation to the party subject to its permanent injunction; that the proceeding for civil contempt for violation of the injunction would be treated as a part of the main cause. Therefore, service of process for the purpose of bringing the respondent within the jurisdiction of the District Court was held not to be necessary, since the respondent was already subject to the jurisdiction of the court for the purposes of all proceedings that were part of the equity suit. The Court said that when there was service at the beginning of a cause, or when the party

submitted to the jurisdiction in whatever form may be required, the necessity of maintaining the physical power could be dispensed with, and it would attribute the same force to the judgment or decree whether the party remained within the jurisdiction or not; that this was one of the decencies of civilization that no one would dispute; that, if a judicial proceeding was begun with jurisdiction over the person of the party concerned, it was within the power of the court to bind him by every subsequent order in the cause; and that, in this view, nothing more was required than appropriate notice of the contempt proceeding, and that notice the respondent had received.

III

(a) An examination of the turn-over order and the jury verdict on which it was based reveals no inconsistencies

The appellant next contends in subdivisions 3 and 4, Part II of his brief, that the turn-over order of October 29, 1937, was irregular and invalid because of certain alleged discrepancies between it and the jury verdict upon which it was based.

As heretofore stated, one of the collectors of the estate filed a petition for a rule to show cause under date of May 20, 1937, alleging that the appellant, as executor, had concealed certain assets of the estate, and praying that an order be entered requiring appellant to make a full accounting of the assets in his hands. Upon consideration of this petition, the Probate Court issued a rule under date of May 25, 1937. And in reply to the rule, the appellant filed an answer, together with two amended answers, stating in substance that the assets in question were the subject of a gift between himself and the deceased. Thereupon the following issues were framed and certified to a jury:

(a) What moneys and assets did Ernst G. Fischer own at the time of his death?

(b) What moneys and assets owned by Ernst G. Fischer, or the proceeds thereof, had been disposed of by Henry J. Watkins, Jr., prior to the death of Ernst G. Fischer otherwise than by application to the use of said Ernst G. Fischer?

In reply to both of these issues, the jury answered by listing certain specific assets, later valued at \$36,108.37. Thereafter, a turn-over order was entered by the Probate Court on October 29, 1937, directing transfer and delivery of the particular assets to the collectors.

The appellant now contends that there is an inconsistency between the answer of the jury to issue (b), and the language of the turn-over order. The argument is made that the jury found that all the money and assets owned by Ernst G. Fischer had been "disposed of" by appellant prior to the death of Ernst G. Fischer, and that this finding was at variance with the decree of the Probate Court directing appellant to turn over the assets to the collectors. For, says the appellant, how can assets that have been "disposed of" be turned over? It is suggested, therefore, that in view of the alleged inconsistency the verdict of the jury should control, and the turn-over order of October 29, 1937, should be held invalid because of the impossibility of complying with its provisions.

In reply to this contention, it is respectfully submitted by the appellee that the obvious intent of both the jury verdict and the court order should not be defeated by an insistence upon a fine-spun definition of words. If an interpretation can be found, logically consistent with the apparent intent of both the jury and of the court, without a distortion of language, then such an interpretation should be followed in preference to one which would nullify the court's order. This is a proposition too well settled to require a citation of authority.

Let us examine closely the issues submitted to the jury. In answer to issue (a), the jury found by direction of the court that Ernst G. Fischer owned certain moneys and assets at the time of his death. In answer to issue (b), the jury found that all of these moneys and assets owned by Ernst G. Fischer had been "disposed of" by Henry J. Watkins, Jr., prior to the death of Ernst G. Fischer, "*otherwise than by application to the use of said Ernst G. Fischer.*" Do the words "disposed of," as used in issue (b), mean that the assets were taken by the appellant from Ernst G. Fischer and have passed out of the hands of appellant and into the hands of third parties? Such is the interpretation contended for by the appellant. But,

obviously, this would be a distortion of the language of the jury verdict. The jury found that the moneys and assets had been disposed of by Henry J. Watkins, Jr., "*otherwise than by application to the use of said Ernst G. Fischer.*" Plainly, this means that the assets passed out of the possession and control of Ernst G. Fischer and into the control of appellant, and that the latter applied these funds to other purposes than to the use of Ernst G. Fischer. This application to other purposes might mean a number of things. Conceivably, it might mean that appellant disposed of the assets to third persons; but, on the other hand, it might mean that appellant disposed of the assets by applying them to his own use. According to *Webster's New International Dictionary*, 2d ed., 1936, the phrase "disposed of," among other definitions, may mean: "to determine the fate of; to fix the condition, employment, etc., of; to direct or assign for use." Such a definition would be consistent with an interpretation of the jury verdict to mean that the appellant determined the fate of the assets of Ernst G. Fischer by assigning them to his own possession or use.

In any event, any ambiguities in the jury verdict were clarified by the court order of October 29, 1937, the form of which was never objected to by appellant. It is apparent from this order, that the Probate Court treated the assets in question as being in the possession of the appellant. This fact has never been denied. The order directed that the assets be transferred and delivered forthwith to the collectors of the estate, and that upon failure to do so the value of the assets should be fixed and determined and judgment should be entered against the appellant, with execution as at law. This order clarified any ambiguities that may have existed in the jury verdict. It cannot be said that the language of the court order was in conflict with a reasonable interpretation of the jury verdict, and if a conflict does exist, certainly, it is not sufficient to invalidate the order.

The appellant relies upon the case of *Moyers v. Cummings*, 17 App. D. C. 269 (1900). This case involves an order directing that a surviving partner turn over certain partnership assets to a receiver appointed by the court. The

order was objected to on the ground that there was no proof showing that at the date of the order the surviving partner had in his actual possession the assets to be delivered. But the Court held that if this were the case, then the surviving partner would be permitted to show such fact in an answer to the rule entered upon disobedience of the turn-over order, and that upon satisfying the court that the money could not be turned over, a modification of the original order could be made.

It is difficult to see how the cited case aids the position of the present appellant. As a matter of fact, it stands as authority for the appellee. The record in the present case fails to show that the assets in question are not in the appellant's hands; and so far as the record reveals, the appellant has never contended that it was impossible for him to make delivery of the assets or their equivalent in value. To the contrary, appellant chose to file no reply to the appellee's rule to show cause why the specific assets should not be turned over in accordance with the order of October 29, 1937. If, indeed, it is now an impossibility for the appellant to comply with the order of the Probate Court then, of course, he is entitled to make appropriate representations to the Probate Court, and if the Court should be satisfied with such representations, then, undoubtedly, some modification of the contempt decree could be made. To date, however, no such representations have been made. It must be presumed, therefore, that both the jury verdict and the court order correctly determined that the appellant had in his possession the disputed assets. *Oriel v. Russell*, 278 U. S. 358.

(b) No inconsistency in fact that turn-over order was based upon the petition of one of the collectors, whereas contempt commitment was based upon the petition of the present executor of the estate

In subdivision 5, Part II of his brief, appellant states that there is fatal inconsistency in the fact that the order of commitment in the contempt proceeding was based upon the petition of one Bouis, the duly confirmed executor of the estate, whereas the turn-over order of October 29, 1937, was based upon the petition of one of the collectors of the estate. It is

apparently argued that this alleged inconsistency makes it impossible for the appellant to purge himself of the contempt decree, since the collectors to whom he was ordered to pay the specific assets of the estate are no longer in existence, and the persons who were collectors have no present authority in law or fact to receive the assets.

This is obviously a frivolous argument. The appellant's objection is in diametric conflict with the D. C. Code (1929), tit. 29, § 154, which section provides that "On the granting of letters testamentary or of administration the power of any such collector shall cease * * * and the executor or administrator *may be permitted to prosecute any suit commenced by said collector as if the same had been begun by said executor or administrator* * * *." [Italics supplied.]

Under the foregoing provision, it is evident that upon the appointment of Bouis as executor of the estate, he succeeded to the powers and duties of the collector who initiated the proceeding which resulted in the turn-over order of October 29, 1937. Consequently, the present executor, Bouis, is the proper person to receive the assets of the estate if and when the appellant desires to purge himself of his contempt.

(c) Habeas corpus cannot be used to attack irregularities in the court order which led to the contempt commitment

As demonstrated in sections (a) and (b) of Part III of this brief, there is no merit to the appellant's contentions relative to certain alleged inconsistencies: (a) between the turn-over order of October 29, 1937, and the jury verdict upon which it was based, and (b) between the petition upon which the turn-over order was based and the petition upon which the contempt proceeding was based. It is readily apparent that the first contention is merely an argument that the contempt commitment is void because based upon an invalid, inconsistent, or irregular turn-over order; and the other contention, at most, is an argument that the contempt commitment is void because based upon an irregular petition.

The appellee submits that neither proposition has any substance in a *habeas corpus* case. Even if it were assumed that the turn-over order was invalid or irregular, it is well settled

that such an order would not be subject to collateral attack by a writ of *habeas corpus* brought to obtain release from a contempt commitment.

Craig v. Hecht, 263 U. S. 255;

Ex parte Kearney, 7 Wheat (20 U. S.) 38;

Reiss v. Shaw, 29 F. (2d) 399 (C. C. A. 8th);

United States ex rel. Paleis v. Moore, 294 F. 852 (C. C. A. 2d);

United States v. Jaeger, 117 F. (2d) 483 (C. C. A. 2d).

And even if it were assumed that some irregularity or inconsistency existed in the contempt proceeding, itself, such a defect would not be subject to attack by *habeas corpus*. It is elementary that *habeas corpus* attacks only jurisdictional defects in the order of commitment.

Story v. Rives, 68 App. D. C. 325, 331, 97 F. (2d) 182;

In Re Morris, 39 Kan. 28, 18 Pac. 171;

Ex parte Cohn, 55 Cal. 193.

IV

(a) The turn-over order provided for concurrent and coexistent remedies and no election was required

The appellee has had considerable difficulty in understanding the tenor of the arguments set forth in subdivisions 3 and 6 and the latter part of subdivision 5, Part II of appellant's brief. However, as far as can be ascertained, the appellant seems to be struggling with two propositions of law, namely, (a) election of remedies, and (b) imprisonment for debt.

(a) As to the first proposition, appellant seems to contend that the commitment for contempt is void because the turn-over order of October 29, 1937, provided alternative remedies, that is: (1) the turning over by appellant of specifically enumerated assets of the estate of Ernst G. Fischer, and (2) upon failure to turn over the specific assets, that the full value of such assets should be determined and judgment thereupon entered against appellant, with execution as at law. Subsequent to the turn-over order of October

29, 1937, the Probate Court did enter a formal judgment against appellant in the amount of \$36,108.37.³ Therefore, the appellant apparently argues that by taking formal judgment, the appellee made a necessary election between the two possible remedies set forth in the decree of October 29, 1937, and that, since the formal judgment was a decree for the payment of money, the appellee cannot enforce such a decree by imprisonment for contempt, in view of the D. C. Code (1929), tit. 18, § 102, which prohibits imprisonment where a decree "only directs the payment of money."

If the foregoing statement correctly sets forth the appellant's argument, then the appellee submits that it is without merit. Assuming that the decree of October 29, 1937, did provide for alternative remedies, such remedies were not inconsistent; they were concurrent and coexistent, and even if the appellee did make an election, he was not estopped from pursuing another remedy if the elected remedy proved futile.

One should bear in mind that the doctrine of election of remedies is often criticized as a harsh one and not a favorite in equity. *Friederichsen v. Renaud*, 247 U. S. 207. Furthermore, as stated by this Court in *McFadden Securities Company v. Stoneleigh Garage*, 60 App. D. C. 400, 402, 55 F. (2d) 1025, 1027: "The doctrine of election, where it applies at all, applies only to a case where one assumes an inconsistent position, or where, through his action, other rights have arisen as to which he should be estopped, to take a contrary position." Still another federal court has said that the doctrine of election of remedies "should be confined to cases 'where double compensation of the plaintiff is threatened, or the defendant has actually been misled by the plaintiff's conduct, or *res judicata* can be applied.' " *National Lock Co. v. Hogland, et al.*, 101 F. (2d) 576, 587 (C. C. A. 7th). See also *Roller v. Murray*, 46 App. D. C. 246, 258; and *United States ex rel. Warren v. Ickes*, 64 App. D. C. 27, 32, 73 F. (2d) 844.

In the present case the decree of October 29, 1937, provided (1) that specific assets be turned over to the duly confirmed

³ Since the filing of the notice of appeal in the present *habeas corpus* proceeding, the appellee issued an unsuccessful writ of attachment on the judgment.

executor, and (2) that upon failure to turn over the specific assets, a judgment with execution at law should be entered. Neither of these remedies was inconsistent. Indeed they might well be compared to the coexistent common-law remedies of detinue and debt, which allowed recovery either of specific property or of a certain sum of money. Either or both remedies could be pursued in the same proceeding until there had been a satisfaction. See *Walker v. Needham*, 3 M. & Gr. 557, *Keigwin's Cases in Common Law Pleading*, p. 84. So also, in the present case, the enforcement of either remedy could be pursued without the necessity of taking any position inconsistent with that necessary to enforce the other. Under such circumstances, the law allows either or both remedies to be pursued until full satisfaction is had. *United States ex rel. Warren v. Ickes*, *supra*. And see *Thomas v. Sugarman*, 218 U. S. 129.

It is evident, therefore, that the present contempt proceeding was not an attempt to enforce the formal judgment authorized by the decree of October 29, 1937. It was a proceeding to enforce the concurrent order to turn over specific assets. An order directing a fiduciary agent to turn over specifically named assets is not an order which "only directs the payment of money" within the meaning of D. C. Code (1929) tit. 18, § 102, and, therefore, imprisonment for disobedience of that order is within the power of both the equity court and the Probate Court.

(b) Enforcement of the turn-over order by commitment for contempt was not imprisonment for debt

As pointed out, the appellant seems to contend that the commitment for contempt in this case was an imprisonment forbidden by the provisions of D. C. Code (1929) tit. 18, § 102. The applicability of the foregoing section to the present proceeding is derived from the fact that the D. C. Code (1929) tit. 18, § 136, provides that decrees of the Probate Court may be enforced in the same manner as a decree in equity, and it is conceded that the power of the equity court to enforce its decrees does not extend to a case where "the decree only directs the payment of money." *Rapeer v. Colpoys*, 66 App. D. C. 216, 85 F. (2d) 715.

However, the appellee submits that the decree of October 29, 1937, directing the appellant to turn over specifically enumerated assets, was not a decree only directing the payment of money. The principle is well settled that a decree directing the turn-over of *specific assets* is not a decree for payment of money. This is illustrated by cases from state courts where a decree directing payment of specific assets has been challenged as conflicting with state constitutional prohibitions against imprisonment for debt. In such cases it usually has been held that a decree directing payment of specific assets does not fall within the same category as a decree directing payment of a money judgment.

Ex parte Fowler (Mo. App.), 273 S. W. 195, 196;
In re Ward's Estate, 159 Wash. 252, 292 Pac. 737;
 And see *Tolman v. Leonard*, 6 App. D. C. 224, 232,
 233.

Still other courts have held that a state constitutional provision prohibiting imprisonment for debt does not apply to a proceeding where a fiduciary agent fails to account for certain trust funds. In such cases the courts have reasoned that a constitutional prohibition against imprisonment for debt is limited to contractual situations, express or implied, and that the duty to account in fiduciary relationship is not a contractual one.

Chew's Appeal, 44 Pa. 247;
Tome's Appeal, 50 Pa. 285;
Messmore's Estate, 293 Pa. 63, 141 A. 724;
In re Weaver's Estate, 114 Pa. Sup. Ct. 439, 174 A.
 905;
Lewis v. Grovas (Ga.), 9 S. E. (2d) 282, 284;
In re Wax' Estate, 268 N. Y. S. 355;
Ryan v. Kingsberry, 88 Ga. 361, 14 S. E. 596;
State v. Mauberret, 47 La. Ann. 334.

This same principle was recognized by the United States Supreme Court in *Mueller v. Nugent*, 184 U. S. 1, 13 (1901), where it was said: "Nor was the commitment imprisonment for debt, as also contended. The order to pay over the money was not an order for the payment of a debt, but an order for

the surrender of assets of the bankrupt placed *in custodia legis* by the adjudication." See also *Schweer v. Brown*, 130 Fed. 328 (C. C. A. 8th).

Although the appellee submits that the imprisonment of appellant for contempt was not an imprisonment for debt such as prohibited by the D. C. Code (1929), tit. 18, § 102, it should be pointed out that it is very possible that the limitation upon the powers of the equity court contained in Section 102 is not applicable to the enforcement of contempt proceedings by the Probate Court.

The D. C. Code (1929), tit. 18, § 132, specifically provides that "every judgment, decree, decision or order" of the probate court "may be enforced by *attachment* and sequestration." [Italics supplied.] Also, the D. C. Code (1929), tit. 18, § 134, provides that the Probate Court "shall have power to order any executor * * * *who appears in default in respect to the rendering of any inventory or account or the fulfillment of any duty in said court* to be summoned to appear therein and to fulfill his duty in the premises * * * and on his appearing the court may pass *such order as may be just*; and upon his failure to appear, after having been duly summoned, may revoke his power to act and *make such further order* and other appointment as justice may require." [Italics supplied.] By virtue of the foregoing provisions it seems apparent that the Probate Court itself has ample power to enforce its decrees, if necessary, by attachment of the person for contempt, without the necessity of resorting to the powers of the equity court. It is hornbook law that every court has the inherent power to enforce its own orders and decrees by summary contempt proceedings if necessary. *Ex parte Robinson*, 19 Wall. (U. S.) 505; *Michaelson v. United States*, 266 U. S. 42. And the probate or surrogate courts of other jurisdictions have been recognized as possessing such power.

Blankenburg v. Commonwealth, 260 Mass. 369, 157 N. E. 693;

Re Merrill, 88 N. J. Eq. 261, 102 A. 400;

Re Moran, 83 Kan. 615, 112 Pac. 94;

Note (1920) 8 A. L. R. 1543, 1551.

Of course, if the appellee is correct in asserting that the Probate Court of the District of Columbia, itself, has both inherent and statutory power to punish for contempt, then it is unlikely that the statutory provision prohibiting imprisonment where the decree "only directs the payment of money" (§ 102, tit. 18), is applicable to, or is a limitation upon the powers of the Probate Court, *since section 102 refers only to the powers of the equity court*. There is no provision in the federal constitution against imprisonment for debt, and there is no other statutory provision applicable to the District of Columbia which prohibits such imprisonment except D. C. Code (1929), tit. 18, § 102. Therefore, even though it be assumed (although as heretofore pointed out, it is not necessary to do so) that appellant was imprisoned for debt in order to enforce a decree of the Probate Court, there is apparently no constitutional or statutory provision prohibiting such imprisonment.

CONCLUSION

It is respectfully submitted that the appellant in this case has offered no real reasons as to why the commitment of contempt is void. Most of the reasons advanced, even if they could be sustained, would not constitute jurisdictional defects so as to render the commitment void, but at most, would constitute mere irregularities.

Throughout the appellant's brief he consistently harps upon one theme: namely, that it is now impossible for him to purge himself of the contempt, because, if he ever had the assets in dispute, he does not now have them. And this is insisted notwithstanding the fact that after his apprehension and detention under the contempt decree, appellant readily secured his freedom by producing a large bond for bail pending this appeal. But appellant's contention of inability is entirely *de hors* the record. There is not a single pleading or paper of any kind in the record which indicates that the appellant is presently unable to comply with the turn-over order of October 29, 1937. See *Clements v. Coppin*, 72 F. (2d) 796 (C. C. A. 9th).

Of course, the Probate Court which committed the contemnor is not going to require him to do an impossible thing.

The Probate Court is a court of justice, not of pain, and upon a proper showing that the appellant does not now have the assets in question, and upon a proper explanation as to what has become of these assets, undoubtedly some modification would be considered in the order of commitment. The terms of the commitment expressly state that the appellant shall be kept in custody only "until further order of this Court." Cf. *Simmons v. Palmer*, 33 App. D. C. 592. To paraphrase the language of the court in *In Re Nevitt*, 117 Fed. 448, 461 (C. C. A. 8th), the appellant carries the keys of his prison in his own pocket.

It should be pointed out, however, that even though the appellant does not now have the assets in question, such an excuse is not sufficient at law to release him from commitment. It is well settled that where an alleged contemnor has voluntarily and contumaciously brought on himself disability to evade an order or decree, he cannot avail himself of a plea of inability to obey, as a defense to the charge of contempt. *Cartwright's Case*, 114 Mass. 230; *Wartman v. Wartman*, Fed. Cas. No. 17,210; *Ex parte Fuller*, 330 Mo. 371, 50 S. W. (2d) 654; see also Note (1939) 120 A. L. R. 703, 704; Note (1929) 60 A. L. R. 322.

As stated by the Supreme Court in *Oriel v. Russell*, 278 U. S. 358, 365, in discussing the conclusiveness of a turn-over order in a contempt proceeding:

"In the case in hand, the consequence is that, as the order to pay or deliver stands without sufficient reply, it remains what it has been from the first—an order presumed to be right, and therefore an order that ought to be enforced. In the pending case, or in any other, the court may believe the bankrupt's assertion that he is not now in possession or control of the money or the goods, and in that event the civil inquiry is at an end; but it is also true that the assertion may not be believed, and the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty. No doubt this may be unpleasant; it is intended to be unpleasant, but I see no

reason why the proceeding should be condemned, as if it interfered with the liberty of the citizen without sufficient reason or excuse. I have known a brief confinement to produce the money promptly, thus justifying the court's incredulity, and I have also known it to fail. Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I need hardly say that he would always have the right to be released, as soon as the fact becomes clear that he can not obey. Actual or virtual imprisonment for debt has ceased, but imprisonment to compel obedience to a lawful judicial order (if it appear that obedience is being willfully refused) has not yet ceased and ought not to cease, unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees."

* * * the contemnors had ample opportunity in the original hearing to be heard as to the fact of concealment, and in the motion for the contempt to show their inability to comply with the turn-over order. They did not succeed in meeting the burden which was necessarily theirs * * *.

In the present case, therefore, the District Court properly discharged the appellant's writ of habeas corpus and remanded the appellant to the custody of the appellee. This order should be affirmed.

Respectfully submitted.

EDWARD M. CURRAN,
United States Attorney,

JOHN H. MITCHELL,
Assistant United States Attorney,

CHARLES B. MURRAY,
Assistant United States Attorney,

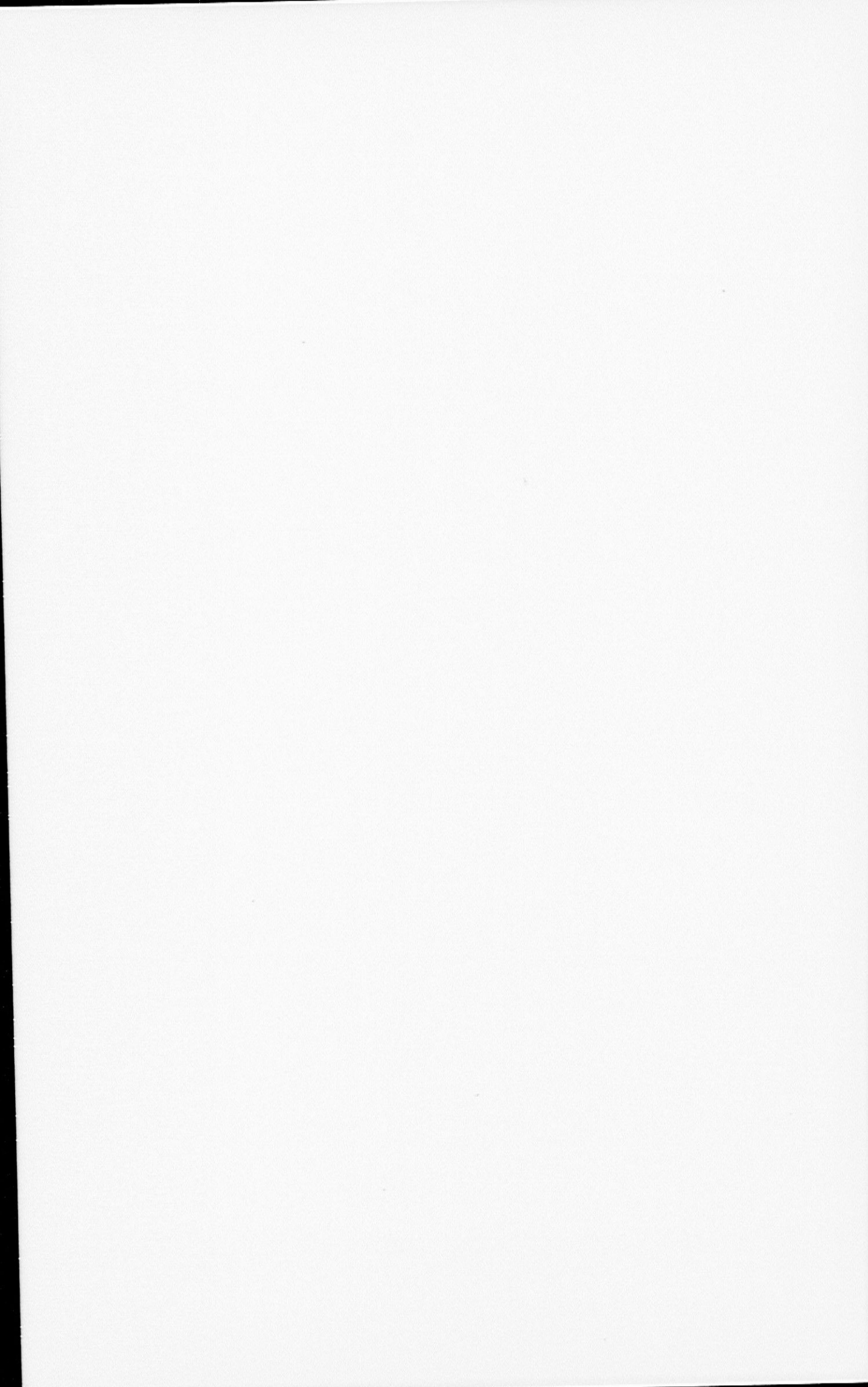
DENNIS MCCARTHY,
Assistant United States Attorney.

ERNEST F. HENRY,
Amicus curiae.

APPENDIX

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APPENDIX

43 IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding a Probate Court

Probate No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

PETITION FOR ADMISSION OF WILL TO PROBATE AND THE ISSUANCE
OF LETTERS TESTAMENTARY

To the Supreme Court of the District of Columbia:

The petitioner, Henry J. Watkins, Jr., respectfully represents as follows:

1. That he is a citizen of the United States and a resident of the District of Columbia, and files this petition as the Executor named in the last will and testament of the decedent, Ernst G. Fischer, as will hereinafter more particularly appear.

2. That heretofore, to wit: on the 22nd day of September 1935 the said Ernst G. Fischer, who was at the time of his death a resident of the District of Columbia, departed this life in the City of Washington, District of Columbia, leaving, as your petitioner has been informed and believes, the following adults as his heirs at law and next of kin: Helene Fischer, niece; Ernst Fischer, nephew; and Gerhard Fischer, nephew. Their last address known to this petitioner is Behrischstrasse 21, Dresden, Germany.

3. That said decedent left a last will and testament duly executed according to law to pass title to both real and personal property, which said last will and testament bears date the 12th day of August 1935, and has been duly approved according to law and filed for probate and record in this Court; that at the time of his death the said decedent was

not seized of any real estate, but was possessed of certain household furniture, notes, stocks, bonds, securities, and cash on deposit in banks, all of the estimated value of approximately \$20,500.00.

44 4. The petitioner further represents that the debts of said estate, including funeral expenses and current bills, will amount approximately to \$1,500.00.

5. This petitioner is named as Executor of the estate of said Ernst G. Fischer in and by his last will and testament, and under the provisions of his said last will and testament is entitled to the residuum of the estate of said decedent.

Wherefore, the premises considered, the petitioner prays:

(1) That the said paper writing dated the 12th day of August 1935, may by order of this Court be admitted to probate and record as the last will and testament of said Ernst G. Fischer, and that letters testamentary upon said estate may be issued to this petitioner and that he may be permitted to file a special undertaking conditioned for the payment of all debts, claims, damages, and legacies.

(2) And for such other and further relief as the petitioner may be entitled to in the premises.

(Signed) HENRY J. WATKINS, Jr.,

(Signed) ELLIS, FERGUSON & HOUGHTON,

By WOODSON P. HOUGHTON,

Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *to wit:*

Henry J. Watkins, Jr., being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the said petition and knows the contents thereof; that the matters and things therein stated of his personal knowledge are true and those stated upon information and belief he believes to be true.

(Signed) HENRY J. WATKINS, Jr.

Subscribed and sworn to before me, this 30th day of September 1935.

(Signed) MINERVA G. CULTON,

Notary Public, D. C.

[SEAL]

* * * * *

259 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

DECREE DENYING PROBATE, DISMISSING PETITION, AND AWARDING
COSTS

This cause came on regularly to be heard upon petition of Henry J. Watkins, Jr., offering the admission to probate and record of a certain paper writing dated August 12, 1935, and purporting to be the last will and testament of Ernst F. Fischer and upon the pleadings thereon and the verdict of the Jury rendered upon the trial of the issues heretofore framed herein and directed to be tried by Jury; and it appearing to the Court from the record of said trial that by the verdict as to said issues, the Jury impanelled to try the four issues found on March 2, 1937, as to the first issue:

Was the paper writing bearing date the 12th day of August 1935 the last will and testament of said Ernst G. Fischer, deceased?

No.

and as to the second issue:

Was the said paper writing bearing date the 12th day of August 1935 executed in due form as required by law?

Yes.

and as to the third issue:

260 Was the said decedent, Ernst G. Fischer, at the time of the making and subscribing or the acknowledgment by him of the said paper writing dated the 12th day of August 1935, of sound and disposing mind and capable of executing a valid deed or contract?

No.

and as to the fourth issue:

Was the said paper writing bearing date the 12th day of August 1935, purporting to be such last will and

testament, obtained, or the execution thereof, procured, by the undue influence and coercion exercised upon the said decedent, Ernst G. Fischer, by one Henry J. Watkins, Jr., and/or by some other person or persons unknown to the caveator?

Yes.

and it further appearing to the Court that a motion to set aside said verdict and to grant a new trial of said first, third, and fourth issues was submitted to and overruled by the Justice presiding at the trial of said four issues on the 25th day of March 1937; it is therefore, by the Court, this 25th day of March 1937, adjudged, ordered, and decreed, that the said paper writing bearing date August 12, 1935, purporting to be the last will and testament of said Ernst G. Fischer, deceased, is not a valid will or testament and that probate thereof be and is hereby denied.

It is further adjudged, ordered, and decreed that the petition of the said Henry J. Watkins, Jr., for the probate of said alleged will be and the same hereby is dismissed and the caveator is hereby awarded his costs against the caveatee, Henry J. Watkins, Jr., with execution as at law.

(Signed) JOSEPH W. Cox, *Justice*.

Exception noted:

Appeal is hereby noted from the above Decree. Cost bond on appeal is hereby fixed at \$100.00 or \$50.00 in cash.

(Signed) JOSEPH W. Cox, *Justice*

* * * * *

268 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

PETITION FOR RULE TO SHOW CAUSE

The petition of Jerome F. Barnard respectfully shows to the Court as follows:

I

That he is one of the duly qualified and acting Collectors herein of the estate of the above-named decedent, and that Meyer J. Sawyer, his Co-Collector, has declined to join in this petition solely by reason of his desire to continue his representation of the respondent herein.

II

That the said Ernst G. Fischer left a paper writing bearing date the 12th day of August 1935, under the terms of which Henry J. Watkins, Jr., was named as sole executor thereof, as well sole beneficiary of the estate of the said decedent.

III

That following the death of the decedent, the said Henry J. Watkins, Jr., filed herein a petition for the admission of the said testamentary paper writing to probate and record and the grant of letters testamentary upon the said estate unto him as the executor nominated thereunder. The said Henry J. Watkins, Jr., during the lifetime of the said decedent, acted as his agent and representative, handled all of his
269 affairs, was doing so at the time of the decedent's death and continued so to do for some time thereafter, and also had in his possession certain of the decedent's records and assets. Petitioner further shows that in and by item three of the petition of the said Henry J. Watkins, Jr., among other things he alleged and stated under oath that "at the time of his death the said decedent was not seized of any real estate, but was possessed of certain household furniture, notes, stocks, bonds, securities, and cash on deposit in banks, all of the estimated value of approximately \$20,500.00," which the said Henry J. Watkins, Jr., has heretofore admitted under oath to have received, and in addition thereto has stated under oath that he received funds during the lifetime of said decedent to be applied toward payment of said decedent's just debts. Item four of the said petition states that "The petitioner further represents that the debts of said estate, including

funeral expenses and current bills, will amount approximately to \$1,500.00."

Petitioner further shows that under date of March 25, 1937, a decree was entered herein denying probate of the aforesaid testamentary writing dated August 12, 1935.

The petitioner further states that the Collectors have received to date from the said Henry J. Watkins, Jr., and all other sources the sum of Two Hundred and Eleven Dollars (\$211) in cash; 20 shares of the Capital stock of the American Hawaiian Steamship Company; and 10 shares of the no par common stock of the Radio Corporation of America, all as constituting assets of the estate of the said decedent.

In addition to the foregoing, the Collectors have received, and now hold, a Forty-Seven Hundred Dollar (\$4,700)
 270 promissory note with collateral consisting of sixty shares of the Preferred stock of the Mt. Vernon Woodberry Mills, Incorporated, which said note and stock, however, are claimed by Clarence G. Bouis as his individual property and as forming no part of the assets of the estate.

IV

Petitioner states that although often requested so to do, the said Henry J. Watkins, Jr., has failed to turn over and deliver to the Collectors all or any part of the aforementioned assets except those heretofore described as having been received, and your petitioner is informed and believes that he has concealed certain assets of the estate and has failed to pay all of the debts and expenses of the last illness and funeral of the decedent. Petitioner respectfully submits that it is for the best interests of the estate, and it is necessary and proper in order to administer upon and close the estate that the said Henry J. Watkins, Jr., as the executor nominated under the aforesaid paper writing and executor *de son tort* be required to transfer and deliver to the Collectors all of the aforesaid assets of the estate of the said Ernst G. Fischer not yet delivered to the estate and fully to account for and report to this Honorable Court all funds so collected by him and disbursements as

may be claimed by him to have been made for the account of the decedent and his estate.

Wherefore, the premises considered, your petitioner respectfully prays:

1. That a rule be issued herein against the said Henry J. Watkins, Jr., to require him to show cause, if any he have, by a day certain, why he should not transfer and deliver to
271 the Collectors all of the aforesaid assets of the estate of the said Ernst G. Fischer not yet delivered to the estate and fully to account for and report to this Honorable Court all funds so collected by him and disbursements as may be claimed by him to have been made for the account of the decedent and his estate.

2. That the petitioner may have such other and further relief as the exigencies of the case may seem to require or to the Court may appear meet and proper.

(S) JEROME F. BARNARD,
Jerome F. Barnard,
Petitioner.

DISTRICT OF COLUMBIA, ss:

I, Jerome F. Barnard, being first duly sworn, on oath depose and say that I have read the foregoing petition by me subscribed and know the contents thereof; that the matters and things therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

(S) JEROME F. BARNARD.
Jerome Barnard.

Subscribed and sworn to before me this 20th day of May 1937.

(S) R. S. HARRINGTON,
Notary Public, D. C.

* * * * *

277 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

RULE TO SHOW CAUSE

Upon consideration of the petition of Jerome F. Barnard, Collector herein, it is, by the Court, this 21st day of May 1937.

Ordered, that Henry J. Watkins, Jr., be, and he hereby is, ordered to show cause, if any he have, by the 1st day of June 1937, why he should not transfer and deliver to the Collectors of the estate of Ernst G. Fischer, deceased, all of the assets of the said estate received by him and not yet delivered to the said Collectors, and fully to account for and report to this Court all funds collected by him and disbursements as may be claimed by him to have been made for the account of the said decedent and his estate, provided a copy of this order be served upon the said Henry J. Watkins, Jr., on or before the 25th day of May 1937.

JESSE C. ADKINS, *Justice.*

Served a copy of the within above rule on Henry J. Watkins, Jr., by serving Meyer J. Sawyer as directed personally May 25, 1937.

JOHN B. COLPOYS,
U. S. Marshal in and for the Dist. of Columbia.

by THOMAS EAST,
Deputy U. S. Marshal.

* * * * *

290 DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

ANSWER OF HENRY J. WATKINS, JR., TO PETITION AND RULE
TO SHOW CAUSE

The answer of Henry J. Watkins, Jr., the respondent in the above-entitled cause, to the petition filed herein by Jerome F. Barnard, and the rule issued thereon respectfully shows to this Honorable Court as follows:

1. Respondent admits that Jerome F. Barnard is one of the duly qualified and acting collector of the estate of Ernst G. Fischer, deceased, and that Meyer J. Sawyer is a Co-Collector, and that having no personal knowledge of the declination of the said Meyer J. Sawyer contained in the said petition, he can therefore neither admit nor deny the same.

2. That he admits the allegations contained in paragraph two of the said petition.

3. This respondent admits that following the death of the deceased he filed a petition in the above-entitled cause for the admission of the said testamentary paper writing mentioned in paragraph two of the petition for a rule to show cause, to probate, and record. He denies that during the lifetime of the deceased he handled all of the affairs of the said deceased except during the time the said decedent was confined in Garfield Memorial Hospital with an ailment from
291 which he died. He admits that because of the inability of the deceased to attend to his affairs during his illness, respondent attended to them for him, and admits that he had in his possession certain of the deceased's records and assets, which said records and assets came into his possession by reason of a gift to him by the deceased during his lifetime. Respondent admits the allegations in the petition for a rule to show cause as to the allegations contained in petition for the

admission of the aforesaid last will and testament of the deceased to probate and record. Further answering paragraph three of the petition for a rule herein, respondent avers that there was an understanding between this respondent and the deceased that out of the gifts so made by the deceased to this respondent that respondent was to pay all of the just debts of the decedent. Respondent admits the allegations respecting the approximate amount of the indebtedness of the estate.

Respondent admits that on March 25, 1937, a decree was entered herein denying probate of the said testamentary writing dated August 12, 1935.

Respondent admits that there is now in the hands of the collectors of the above entitled estate the sum of two hundred and eleven (\$211.00) dollars in cash; twenty (20) shares of the Capital Stock of the American Hawaiian Steamship Company; and ten (10) shares of the Common Stock of the Radio Corporation of America, all of which was turned over to Meyer J. Sawyer who at the time of the delivery of this property, was acting as respondent's counsel. That in addition to the foregoing he also turned over to the aforesaid Meyer J. Sawyer, a promissory note of the value of four thousand, seven hundred (\$4,700.00) dollars, with collateral attached thereto consisting of sixty (60) shares of the Preferred Stock of the Mount Vernon Woodberry Mills, Incorporated.

4. Answering paragraph four of the petition for rule to show cause, respondent denies that he has concealed certain
 292 assets of the estate; he likewise denies that he has failed to pay the debts and expenses of the last illness and funeral of the decedent. Respondent avers upon information and belief that all of the aforesaid debts and expenses of the last illness and funeral of the decedent have been paid. Further answering the said petition respondent avers that all of the property he received from the aforesaid Ernst G. Fischer, deceased, was a gift to him by the decedent during his lifetime, all of which he claims as a gift, and forming no part of the estate herein, and therefore should not be required to transfer and deliver to the collectors that property which he claims as a gift, or be required to account to this Court for the same.

Wherefore the premises considered, respondent prays that the petition herein be dismissed and the rule issued thereon be discharged.

(Signed) HENRY J. WATKINS, Jr.,

(Signed) CEDRIC F. JOHNSON,

Cedric F. Johnson,

503 D Street NW., Phone: National 2937,

Attorney for Respondent.

STATE OF VIRGINIA,

County of Warren:

Henry J. Watkins, Jr., being first duly sworn on oath deposes and says that he has read the foregoing answer by him subscribed, and that he knows the contents thereof; that the matters and things therein stated of his personal knowledge are true, and those stated upon information and belief he believes to be true.

(Signed) HENRY J. WATKINS, Jr.

Subscribed and sworn to before me this 23 day of June 1937.

(Signed) C. A. KIDD,

Notary Public.

My Commission Expires Jan. 2, 1940.

* * * * *

298 DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE THE ESTATE OF ERNST G. FISCHER, DECEASED

AMENDED ANSWER OF HENRY J. WATKINS, JR., TO PETITION FOR
RULE TO SHOW CAUSE

The amended answer of Henry J. Watkins, Jr., the respondent in the above-entitled cause, to the petition filed herein by Jerome F. Barnard, and the rule issued thereon, with leave of Court having been first had and obtained, respectfully shows to this Honorable Court as follows:

1. Respondent admits that Jerome F. Barnard is one of the duly qualified and acting collectors of the Estate of Ernst G.

Fischer, deceased, and that Meyer J. Sawyer is a co-collector, and that having no personal knowledge of the declination of the said Meyer J. Sawyer, contained in said petition, he can therefore neither admit nor deny the same.

2. That he admits the allegations contained in paragraph two of the said petition.

3. This respondent admits, that following the death of the said Ernst G. Fischer, he filed a petition in the above-entitled cause, for the admission of the said testamentary paper writing mentioned in paragraph two of the petition for a rule to show cause, to probate and record. Respondent denies, that during the lifetime of the deceased, he handled all of the affairs of the said deceased, except during the time the decedent was confined in Garfield Memorial Hospital with an ailment from which the said decedent died. Respondent admits that because
 299 of the inability of the deceased to attend to his affairs, during his last illness, respondent attended to them for him. Respondent admits that he had in his possession certain of the decedent's records and assets, which said records and assets came into the possession of your respondent, under and by virtue of a gift to him by the deceased, during the lifetime of the deceased. Respondent admits the allegations contained in the petition for a rule to show cause, respecting the allegations contained in his petition for the admission of the last will and testament of the deceased to probate and record. And respondent further states, that it was his understanding, that an amended petition for the admission of the said will to probate and record, was to have been filed because an error had been made in the original petition in estimating the value of the estate left by the decedent, which was to pass under the terms of the aforesaid last will and testament. And your respondent is unable to state any reason why an amended petition was not filed. Further answering paragraph three of the petition for a rule to show cause, respondent avers, that there was an understanding between this respondent and the deceased, that out of the gifts so made by the deceased to this respondent, that respondent was to pay all of the just debts of the deceased. Respondent admits the allegations respecting the approximate amount of the indebtedness of the said estate. Respondent admits that on March 25, 1937, a decree was en-

tered herein denying probate of the said testamentary writing dated August 12, 1935. Respondent admits that there is now in the hands of the collectors of the above-entitled estate, the sum of two hundred eleven (\$211.00) dollars; twenty (20) shares of the Capitol Stock of the American Hawaiian Steamship Company, and ten (10) shares of the Common Stock of the Radio Corporation of America, all of which was turned

over to Meyer J. Sawyer, Esquire, at the time he was
300 acting as counsel for your respondent. That in addition

to the foregoing, respondent also turned over to the said Meyer J. Sawyer, Esquire, a promissory note of the value of four thousand seven hundred (\$4,700.00) dollars, with collateral attached thereto, consisting of sixty (60) shares of the Preferred Stock of Mount Woodbury Mills, Incorporated. That the foregoing, together with fifteen shares (15) Manchester Terminal Bonds, and twenty-seven (27) Associated Gas and Electric Bonds, were delivered to the decedent and received by your respondent as a gift, when the said deceased delivered to your respondent a key to his safety deposit box in the Washington Loan and Trust Company, in the City of Washington, District of Columbia, and in addition executed an authorization to the said Washington Loan and Trust Company, authorizing respondent to enter his said safety deposit box. That in addition to the foregoing the decedent authorized the sale of certain shares of the Capital Stock of the American Tobacco Company, deposited as collateral to a promissory note in the Washington Loan and Trust Company, the proceeds of which was used, in part, to pay the said note, and the balance thereof was thereafter received by this respondent from the deceased as a gift, in the form of a check, payable to the order of your respondent.

4. Answering paragraph four of the petition for a rule to show cause, respondent denies that he has concealed certain assets of the estate; he likewise denies that he failed to pay the debts and expenses of the last illness and funeral of the deceased, and he avers upon information and belief that the affidavit of Meyer J. Sawyer, Esquire, is filed of record in the above-entitled cause, showing that the aforesaid expenses have been paid. Further answering the said peti-

tion, respondent avers that all of the property he received from the said Ernst G. Fischer, deceased, was a gift to him by the decedent during his lifetime, and forms no part of the estate herein, all of which respondent claims as a gift to him from the deceased, and therefore respondent avers, that he should not be required to transfer and deliver to the said collectors the property which he claims as a gift, or be required to account to this Court for the same.

Wherefore the premises considered, respondent prays that the petition herein be dismissed and the rule issued thereon be discharged.

HENRY J. WATKINS, Jr.

CEDRIC F. JOHNSON,

Cedric F. Johnson,

503 D. Street, NW., National 2937,

Attorney for Respondent.

STATE OF MARYLAND.

County of Montgomery, ss:

Henry J. Watkins, Jr., being first duly sworn on oath deposes and says, that he has read the foregoing amended answer by him subscribed, and that he knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge and belief.

HENRY J. WATKINS, Jr.

Subscribed and sworn to before me this 3d day of July 1937.

[SEAL]

H. EDSON ROGERS,

Notary Public, Md.

* * * *

312 DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE THE ESTATE OF ERNST G. FISCHER, DECEASED

AMENDED ANSWER OF HENRY J. WATKINS, JR., TO PETITION FOR
RULE TO SHOW CAUSE

The further amended answer of Henry J. Watkins, Jr., the respondent in the above-entitled cause, to the petition filed

herein by Jerome F. Barnard, and the rule issued thereon, with leave of Court having been first had and obtained, respectfully shows to this Honorable Court as follows:

1. Respondent admits that Jerome F. Barnard is one of the duly-qualified and acting collectors of the Estate of Ernst G. Fischer, deceased, and that Meyer J. Sawyer is a cocollector, and that having no personal knowledge of the declination of the said Meyer J. Sawyer, contained in said petition, he can therefore neither admit nor deny the same.

2. That he admits the allegations contained in paragraph two of the said petition.

3. This respondent admits, that following the death of the said Ernst G. Fischer, he filed a petition in the above entitled cause, for the admission of the said testamentary paper writing mentioned in paragraph two of the petition for a rule to show cause, to probate and record. Respondent denies, that during the lifetime of the deceased, he handled all of the affairs of the said deceased, except during the time the decedent was confined in Garfield Memorial Hospital with an ail-
 313 ment from which the said decedent died. Respondent admits that because of the inability of the deceased to attend to his affairs, during his last illness, respondent attended to them for him. Respondent admits that he had in his possession certain of the decedent's records and assets, which said records and assets came into the possession of your respondent, under and by virtue of a gift to him by the deceased, during the lifetime of the deceased. Respondent admits the allegations contained in the petition for a rule to show cause, respecting the allegations contained in his petition for the admission of the last will and testament of the deceased to probate and record. And respondent further states, that it was his understanding, that an amended petition for the admission of the said will to probate and record, was to have been filed, because an error had been made in the original petition in estimating the value of the estate left by the decedent, which was to pass under the terms of the aforesaid last will and testament. And your respondent is unable to state any reason why an amended petition was not filed. Further answering paragraph three of the petition for a rule to

show cause, respondent avers, that there was an understanding between this respondent and the deceased, that out of the gifts so made by the deceased to this respondent, that respondent was to pay all of the just debts of the deceased. Respondent admits the allegations respecting the approximate amount of the indebtedness of the said estate. Respondent admits that on March 25, 1937, a decree was entered herein denying probate of the said testamentary writing dated August 12, 1935. Respondent admits that there is now in the hands of the collectors of the above entitled estate, the sum of two hundred eleven (\$211.00) dollars; twenty (20) shares of the Capital Stock of the American Hawaiian Steamship Company, and ten (10) shares of the Common Stock of the Radio Corporation of America, all of which was turned over to Meyer J. Sawyer, Esquire, at the time he was acting as counsel for your respondent. That in addition to the foregoing, respondent also turned over to the said Meyer J. Sawyer, Esquire, a promissory note of the value of four thousand seven hundred
 314 (\$4,700.00) dollars, with collateral attached thereto, consisting of sixty (60) shares of the Preferred Stock of Mount Woodbury Mills, Incorporated. That the foregoing, together with fifteen shares (15 Manchester Terminal Bonds, and twenty-seven (27) Associated Gas and Electric Bonds, were delivered to the decedent and received by your respondent as a gift, when the said deceased delivered to your respondent a key to his safety deposit box in the Washington Loan and Trust Company, in the City of Washington, District of Columbia, and in addition executed an authorization to the said Washington Loan and Trust Company, authorizing respondent to enter his said safety deposit box. That in addition to the foregoing the decedent authorized the sale of certain shares of the Capital Stock of the American Tobacco Company, deposited as collateral to a promissory note in the Washington Loan and Trust Company, the proceeds of which was used, in part, to pay the said note, and the balance thereof was thereafter received by this respondent from the deceased as a gift, in the form of a check, amounting to the sum of eleven thousand eight hundred six dollars and twenty-three cents (\$11,806.23) payable to the order of your respondent; in addi-

tion to the foregoing the decedent gave to respondent in the form of checks made payable to the order of your respondent, and signed by the deceased, in the following amounts, two hundred and ninety (\$290.00) dollars, ten (\$10.00) dollars, three hundred eighty-two dollars and fourteen cents (\$382.14), and twenty-five (\$25.00) dollars. That out of the foregoing sums a hospital bill amounting to the sum of approximately five hundred (\$500.00) dollars was paid together with the sum of approximately four hundred eighty-five (\$485.00) dollars was paid to nurses for professional services rendered to the decedent.

4. Answering paragraph four of the petition for a rule to show cause, respondent denies that he has concealed certain assets of the estate; he likewise denies that he failed to pay the debts and expenses of the last illness and funeral of the deceased, and he avers that Meyer J. Sawyer, Esquire, has filed

an affidavit, which is of record in the above-entitled
315 cause, showing the following expenses have been paid,

namely, Doctors Hagner and Fuller, for professional services, one thousand three hundred fifty-five (\$1,355.00) Dollars; Thomas Sergeant, Undertaker, two hundred thirteen (\$213.00) dollars; Doctor William G. Morgan, professional services, two hundred sixty-five (\$265.00) dollars; Doctors Groover and Christie, Ex-Rays, one hundred (\$100.00) dollars, and respondent prays that the said affidavit of Meyer J. Sawyer, Esquire, be considered in connection with this answer as though the same had been fully set forth herein. Further answering the said petition, respondent avers that all of the property he received from the said Ernst G. Fischer, deceased, was a gift to him by the decedent during his lifetime, and forms no part of the estate herein, all of which respondent claims as a gift to him from the deceased, and therefore respondent avers that he should not be required to transfer and deliver to the said collectors the property which he claims as a gift, or be required to account to this Court for the same, respondent further avers that the disbursements made by him were not made on account of the estate of the decedent, but by reason of the understanding had between the respondent and the deceased at the time of the aforesaid gifts to him

by the deceased, to the effect that out of the property delivered by the deceased to your respondent, and received by respondent as a gift, that he, the respondent, would pay all of the deceased's just debts, funeral expenses, and expenses of his last illness.

Wherefore the premises considered, respondent prays that the petition herein be dismissed and the rule issued thereon be discharged.

(Signed) HENRY J. WATKINS, Jr.

(Signed) CEDRIC F. JOHNSON,

Cedric F. Johnson,

503 D Street NW., Phone: National 2937,

Attorney for Respondent.

316 STATE OF VIRGINIA.

County of Warren, ss:

Henry J. Watkins, Jr., being first duly sworn on oath deposes and says, that he has read the foregoing amended answer by him subscribed, and that he knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge and belief.

(Signed) HENRY J. WATKINS, Jr.

Subscribed and sworn to before me this 15 day of July 1937.

(Signed) C. A. KIDD,

Notary Public.

My Commission Expires Jan. 2, 1940.

* * * * *

356 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

DECREE ORDERING TRANSFER AND DELIVERY OF ESTATE ASSETS TO
COLLECTORS

Upon consideration of the petition of Jerome F. Barnard,
Co-Collector herein, for rule to show cause against Henry J.

Watkins, Jr., the rule issued herein thereon, the second amended answer thereto of the said Henry J. Watkins, Jr., and upon further consideration of the order entered herein under date of July 16, 1937, framing issues for trial by Jury, and it appearing to the Court that trial of the said issues has been had and upon consideration of the verdict of the said Jury upon said issues rendered on October 8, 1937, in proceedings in Circuit Division No. 2 of the District Court of the United States for the District of Columbia, holding a Special Term as a Probate Court for trial of said issues, which verdict has been duly certified to this Court; and it appearing to the Court from the said petition, answer, order, and verdict, and the other records of this administration cause that Henry J. Watkins, Jr., was named as executor in a paper writing dated August 12, 1935, that the said Henry J. Watkins, Jr., *exercised the powers and performed duties of an executor*, instituted

these proceedings by his petition seeking confirmation
 357 of his acceptance of his appointment as executor as aforesaid, and that the said Henry J. Watkins, Jr., has in his possession certain of said decedent's personal property, being (1) \$11,806.23, the net proceeds of 232 shares Amer. Tob. "B" stock, (2) 15 \$1,000 Manchester Terminal Bonds, 7% 2nd Lien, (3) 30 \$1,000 Associated Gas & Elec. Bonds, 4%, 1978, (4) 40 shares General Electric stock, (5) Cash received in the sum of \$707.14; it is, by the Court, this 29th day of October 1937, adjudged, ordered, and decreed that the said Henry J. Watkins, Jr., be, and he hereby is, directed to transfer and deliver forthwith to the Collectors of the estate of said decedent, all of the aforesaid assets of the said estate, and upon his failure so to do within five days from the signing hereof, the full value of all of said assets or such part thereof as may be elained by the said Henry J. Watkins, Jr., shall be fixed and determined, and thereupon judgment entered against the said Henry J. Watkins, Jr., with execution as at law.

(S) JOSEPH W. Cox, *Justice*.

From the foregoing decree Henry J. Watkins, Jr., notes his appeal in open court to the Court of Appeals, and undertaking

on appeal is fixed in the sum of \$100.00 or deposit of \$50.00 in cash in lieu thereof.

(S) JOSEPH W. Cox, *Justice*.

* * * * *

403 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

The petition of George Ezekiel Bouis, executor of the estate of the above-named decedent, respectfully shows to the Court as follows:

I

That on October 29, 1937, after full hearing of a rule to show cause and answers thereto, this Court issued a decree wherein Henry J. Watkins, Jr., respondent to said rule, was ordered to turn over forthwith to the collectors of this estate certain assets of this estate in his possession, the said assets being (1) \$11,806.23, the net proceeds of 232 shares Amer. Tob. "B" stock, (2) 15 \$1,000 Manchester Terminal Bonds, 7% 2nd Lien, (3) 30 \$1,000 Associated Gas & Elec. Bonds, 4%, 1978, (4) 40 shares General Electric stock, (5) cash received in the sum of \$707.14.

II

That none of the aforesaid assets has been turned over either to the then collectors or this executor, their successor in office charged with the administration of this estate, and the said Henry J. Watkins, Jr., has failed and refused to comply with the requirements of said decree.

404 Wherefore, the premises considered, your petitioner prays:

1. That a rule be issued out of this Court, returnable on the first Thursday occurring five days after service, requiring Henry J. Watkins, Jr., to show cause, if any he has, why he should not be adjudged in contempt of this Court for his

failure to comply with the requirements of the decree herein of October 29, 1937.

2. And for such other and further relief as the Court may deem necessary or proper.

(Signed) GEORGE EZEKIEL BOUIS,
Executor, Estate of Ernst G. Fischer, deceased.

PEELLE, LESH, DRAIN & BARNARD,
By ERNEST F. HENRY,
Attorneys for Petitioner, 1422 F Street NW.

STATE OF MARYLAND,
City of Baltimore, ss:

I, George Ezekiel Bouis, being first duly sworn, on oath depose and say that I have read the foregoing petition by me subscribed and know the contents thereof; that the matters and things therein stated upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

(Signed) GEORGE EZEKIEL BOUIS.

Subscribed and sworn to before me this 27 day of June 1939.

[SEAL] (Signed) HARRY M. HUETHER,
Notary Public in and for the
City of Baltimore, State of Maryland.

My commission expires May 5, 1941.

* * * * *

409 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Adm. No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

RULE TO SHOW CAUSE

Upon consideration of the petition of George Ezekiel Bouis, executor of the estate of the above-named decedent, filed herein the 28th day of June 1939, it is by the Court this 28th day of June 1939,

Ordered, that Henry J. Watkins, Jr., appear in this Court at ten o'clock A. M., on the first Thursday occurring five days after the service of this order upon him, and show cause, if any he has, why he should not be adjudged in contempt of this Court for his failure to comply with the requirements of the decree of this Court herein of October 29, 1937, directing him to transfer and deliver certain assets of this estate forthwith.

JESSE C. ADKINS, *Justice.*

Served a copy of the within above Rule * * * on the above named Henry J. Watkins, Jr., September 19, 1939, personally by serving Mrs. Watkins (adult on the premises) Personally, as directed by attorney.

JOHN B. COLPOYS,

U. S. Marshal in and for the District of Columbia.

By FRANCIS M. GOETZINGER,

Deputy U. S. Marshal.

A true Copy.

Attest:

VICTOR S. MERSCH,

Deputy Register of Wills for the District of Columbia.

* * * * *

473 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Probate Court

Administration No. 48909

IN RE ESTATE OF ERNST G. FISCHER, DECEASED

DECREE FOR CIVIL CONTEMPT

This cause having come on for hearing upon a Rule to Show Cause issued out of this Court against Henry J. Watkins, Jr., upon the petition of George Ezekiel Bouis, executor of the estate of the above-named decedent, and upon consideration thereof, and it appearing to the Court that service of a copy of said petition and rule has been duly made upon said Henry J. Watkins, Jr., and that no answer to said petition or to said rule has been filed either in person or by counsel upon the return thereof, and it further appearing to the Court upon

hearing on said rule in open Court that the said Henry J. Watkins, Jr., has not complied with the order of this Court dated October 29, 1937, requiring him to pay and turn over certain assets which were, by verdict of a jury on December 23, 1937, valued at \$36,108.37, said value being incorporated in a decree of judgment entered by this Court January 27, 1938, and the said Henry J. Watkins, Jr., having failed to show any cause why he should not be adjudged in contempt of this Court for his failure to comply with said order, It is, by the Court this 5th day of January, 1940.

474 Adjudged, ordered, and decreed that the said Henry J. Watkins, Jr., has been, and continues to be, guilty of contempt of this Court, and in punishment therefor, said Henry J. Watkins, Jr., be, and he is hereby, committed to the Washington Asylum and Jail, and the United States Marshal be, and he is hereby, directed to deliver to, and the Washington Asylum and Jail is hereby commanded to receive into its custody, the body of the said Henry J. Watkins, Jr., and safely keep in its custody said body until the said Henry J. Watkins, Jr., shall comply with the said order of this Court dated October 29, 1937, directing him to transfer and deliver up to the said estate (1) \$11,806.23, the net proceeds of 232 shares Amer. Tob. "B" stock, (2) 15 \$1,000 Manchester Terminal Bonds, 7% 2nd Lien, (3) 30 \$1,000 Associated Gas & Elec. Bonds, 4%, 1978, (4) 40 Shares General Electric Stock, (5) Cash received in the sum of \$707.14; or otherwise purge himself by showing that he has disposed of the said assets and by delivery to the said estate of acceptable assets equivalent to the value fixed by the jury verdict aforesaid; and that this shall be authority for the Washington Asylum and Jail to receive and safely keep the said body until further order of this Court.

(Signed) F. DICKINSON LETTS, *Justice*.